SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~679~~ 23

FRIBOURG NAVIGATION COMPANY, INC.,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., MARCH 10, 1965

[fol. A] [File endorsement omitted]

Appendix to Petitioner's Brief—Filed July 10, 1963

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28165

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

[fol. 1]

STATEMENT UNDER RULE 15(B)

This proceeding was commenced by the filing of a petition in the Tax Court of the United States on July 20, 1960 by Fribourg Navigation Company, Inc. The petitioner sought a redetermination of a deficiency in its income tax for the calendar year 1957, which had been determined by the Commissioner of Internal Revenue as set forth in a Notice of Deficiency mailed on April 27, 1960. The Commissioner's answer to the petition was filed September 14, 1960. Trial was had on June 8, 1962 before the Honorable Marion J. Harron, a judge of the Tax Court of the United States. No question was referred to a commissioner, master or referee. The decision of the Tax Court was entered on December 10, 1962, and it was determined that there was a deficiency in income tax for the calendar year 1957 in the amount of $71,430.97.

The petition of Fribourg Navigation Company, Inc. for review by this Court was filed on March 5, 1963. There have been no changes in the parties.

[fol. 2]

BEFORE THE TAX COURT OF THE UNITED STATES

WASHINGTON

Docket No. 88182

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—December 10, 1962

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion filed December 10, 1962, it is

Ordered and decided: That for the taxable year 1957, there is a deficiency in income tax in the amount of $71,430.97.

Enter:

Marion J. Harron, Judge.

[fol. 3]

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 88182. Filed December 10, 1962.

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

T. C. Memo. 1962-290

Held: Claimed depreciation deduction on an asset disallowed for taxable year in which the asset was sold at a price substantially in excess of its undepreciated cost as of

the beginning of the taxable year. *Randolph D. Rouse*, 39 T. C. ....., (October 10, 1962), followed.

James B. Lewis, Esq., and Theodore Ness, Esq., for the petitioner.

Edward H. Hance, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION—
Filed December 10, 1962

HARRON, *Judge:* The Commissioner determined an income tax deficiency for 1957 in the amount of $71,430.97. The question is whether petitioner is entitled to deduct depreciation of an asset used in its business during most of 1957, which was sold at the end of that year at a profit. The asset was sold for an amount which exceeded its depreciated cost at the beginning of the year. Respondent disallowed depreciation for the last period of use of the asset in the amount of $135,367.24.

[fol. 4]

Findings of Fact

The stipulated facts are found as stipulated and are incorporated herein by this reference.

The petitioner had its principal place of business in New York City. It kept its books and filed its returns on the basis of a calendar year and an accrual method of accounting. Its return was filed with the district director of internal revenue for the District of Lower Manhattan.

Petitioner was organized on February 15, 1946, and was dissolved on January 17, 1958, pursuant to a plan of liquidation adopted in 1957 which came within the provisions of section 337 of the 1954 Code.

During 1957 and before, petitioner's business was the operating of ships, which it owned, in foreign commerce under charters from those having dry, bulk cargoes for shipment. In 1957 petitioner owned and operated two ships, only, the *Flying Foam* and the *Joseph Feuer*. The *Flying Foam* is a CIB type steam turbine, dry cargo vessel, a faster ship of better engine type than the *Feuer*. The *Feuer* is a Liberty-type dry cargo ship. The issue presented relates to the *Feuer*.

The *Feuer* was constructed in 1943 for the United States Maritime Commission for emergency use during World War II. On December 21, 1955, petitioner purchased the *Feuer* from Drytans, Inc., for cash in the amount of $469,000. Petitioner's use of this ship is set forth hereinafter.

Before buying the *Feuer*, petitioner's attorney applied for and received a letter-ruling, dated December 8, 1955, from the Engineering and Valuation branch of the Internal Revenue Service with respect to depreciation of the ship [fol. 5] under the straight line method of depreciation, as follows: Petitioner was advised that the Internal Revenue Service would accept a "useful economic life" of 3 years from the date of acquisition; a salvage value of $54,000, computed on the basis of $5 per dead weight ton for 10,800 tons; and that the cost of $469,000, less the salvage value, should be spread ratably over a period of 3 years from the date of acquisition. The ruling also stated that it should be understood that the cost of the ship would be subject to check by the office of the district director, that the estimated remaining useful life was "subject to such change as subsequent experience may warrant," and that the ruling was not to be construed as an agreement within section 167(d) of the 1954 Code.

Acting in accordance with the ruling, petitioner computed depreciation of the *Feuer* on the basis of $415,000 (cost less salvage value of $54,000) which it spread over a 3-year useful life from December 21, 1955, to December 21, 1958, under the straight line method. This resulted in depreciation at a daily rate of about $378.65 ($378.64963) over a period of 1,096 days. If petitioner had owned and used the ship for 3 years from the date of purchase to December 21, 1958, and if the above ruling with respect to allowable depreciation had not been changed, petitioner would have computed annual depreciation about as follows:

Year	Days of Use	Depreciation
1955	10 days	$ 3,786.50
1956	366 days	138,585.77
1957	366 days	138,585.77
1958	354 days	134,041.96
	1,096 days	$415,000.00

[fol. 6] Petitioner, in fact, claimed a deduction for depreciation of the *Feuer* on the above basis for 10 days in 1955 and all of 1956 in the respective amounts of $3,786.50 and $138,585.77. Upon audit of its returns for those years the depreciation deductions were allowed by the respondent. The total depreciation allowed for 1955 and 1956 amounted to $142,372.27; and the depreciated cost of the *Feuer* at the beginning of 1957 was $326,627.73.

The Internal Revenue Service did not change the ruling of December 8, 1955, relating to useful economic life and salvage value of the *Feuer*.

The Suez Canal in normal times is the busiest interocean canal in the world. Under an international convention made in 1888, the Canal was to be open to all nations. Prior to 1956 a commission composed mostly of British and French nationals directed the management of the Canal. On June 13, 1956, Great Britain ended its 74-year military occupation of the canal area pursuant to an agreement with Egypt. On July 26, 1956, Egypt seized the Canal. Israel invaded Egypt on October 29, 1956, and two days later Great Britain and France attacked Egypt in an effort to restore international control of the Canal. During the hostilities the Canal became blocked by sunken vessels. The fighting was ended on November 7, 1956, by United Nations action. The United Nations sent a police force to maintain peace in the canal area; it aided in salvage operations necessary to clear the canal. The canal was reopened for full-time use on March 29, 1957, under Egyptian management.

Because of the blockages of the Suez Canal, ships had to take the longer routes to places otherwise reached by going through the Canal. There was a resulting scarcity of [fol. 7] available ships to carry cargoes. Also, European governments, anticipating a long delay in the opening of the Canal, began stockpiling oil and other commodities. There were resulting increases in charter rates, which reached a peak in January and February of 1957, and the scarcity of ships caused sales prices of ships to rise sharply. In January and February of 1957, purchasers were willing to pay as much as $1,000,000 for American flag Liberty-type ships.

In June of 1957 the president of Isbrandtsen Company Inc. approached the petitioner about the possible purchase of the *Feuer*, although petitioner had not put the ship up for sale. Like the petitioner, Isbrandtsen Company used Liberty-type ships in its business. Petitioner received the offer of an excellent price for the *Feuer* and for that reason decided to sell the ship, although petitioner had used it in its business for only about 18 months.

On June 14, 1957, petitioner entered into a contract for the sale of the *Feuer* to the Isbrandtsen Company for $700,000, payable $350,000 in cash at the time of the closing; $175,000 six months later, under a 5 percent note; and $175,000 one year later, under a 5 percent note. The contract called for delivery of the ship during December 1957.

As of June 14, 1957, there had been an appreciation in the value of the *Feuer* due to economic and market conditions.

After entering into the contract, Isbrandtsen Company, on the same day, assigned all of its contractual rights to a New York City partnership, Long, Quinn & Boylan Co., which is engaged in the business of acting as a broker for ship owners and persons desiring to charter ships. [fol. 8] Long, Quinn & Boylan did not operate the *Feuer*; they chartered the ship to Isbrandtsen Company.

On December 23, 1957, petitioner delivered the *Feuer* to Long, Quinn & Boylan at Hoboken, New Jersey. On the same day the contract of sale was modified; Long, Quinn & Boylan paid petitioner $695,500 for the ship: $625,000 was paid in cash; $70,000 was to be paid one year later under a 5 percent note.

As of December 23, 1957, petitioner had used the *Feuer* in its business for two years, i.e., one year less than the period of three years, the useful economic life of the ship which was estimated at the time of acquisition in 1955. Petitioner continued to own its other ship, the *Flying Foam*. Petitioner's past experience did not show that it followed a practice of buying and then selling ships after a short period of use.

In its income tax return for 1957, petitioner deducted depreciation of the *Feuer* for 357½ days, the period during which it had used the ship in its business up to the time of delivery to the purchaser. Petitioner deducted $135,367.24 for depreciation which was computed in the same way as for prior periods of use.

The respondent disallowed in full the depreciation deduction. In the statutory deficiency notice the only explanation given for the denial of the deduction was that the petitioner "was not entitled to depreciation * * * under the applicable provisions of the Internal Revenue Code of 1954."

In its return for 1957, petitioner reported gross profit after costs of operations in the amount of $391,811.31, of which amount about $289,340 represented gross profit [fol. 9] from the operation of the *Feuer*. Petitioner reported taxable income, after the depreciation deduction of $135,367.24, in the amount of $141,193.35.

On March 7, 1957, prior to the sale of the *Feuer*, petitioner adopted a plan of complete liquidation to be completed within a period of 12 months. Petitioner carried out the plan within 12 months. All of its assets, less those retained to meet claims, were distributed to its stockholders in redemption of stock, including the proceeds from the sale of the *Feuer*. Since the plan of liquidation came within the scope of section 337, no gain or loss to petitioner was recognized from its sale of the *Feuer* within the 12-month period. For information purposes only petitioner reported the sale of the *Feuer* at a profit in its income tax return for 1957. Petitioner reported gain, after total depreciation of $277,739.51 (including depreciation for 357½ days in 1957 of $135,367.24), in the amount of $504,239.51.

From December 21, 1955, to December 23, 1957, the *Feuer* was operated under the American flag as a tramp ship, without a regular schedule. It was operated under 6 charters carrying either grain, sugar, fertilizer, or scrap iron from the United States to Korea, Japan, Morocco, Egypt, Israel, and India. Return voyages were made with-

out cargoes, but such arrangement did not involve any loss because of foreign aid program payments made by the United States.

At the end of 1957, there were only about 88 Liberty-type ships which were privately owned and operated under the American flag; 70 were operated as tramp ships. Liberty ships have a speed of about 10 knots and a cubic capacity of about 475,000 feet. Modern cargo ships, built [fol. 10] after the war, are superior, having a speed of 14 to 18 knots and cubic capacity of about 600,000 feet. In postwar commerce, Liberty ships carried low-paying bulk commodities, principally grain and coal. After the Suez Canal crisis, tankers built during the crisis began carrying grain in competition with American flag Liberty ships.

By the end of 1957, charter rates had fallen sharply from the high levels they had reached during the Suez crisis. This sharp drop in charter rates resulted from the reopening of the Canal, the diminishing of world tension, the entry into the market of large modern vessels, and the realization by the European governments that they had overstocked commodities.

The above-described movements in charter rates are reflected in the voyage charter fixtures (i.e., contracts for the shipment of goods) published weekly by Maritime Research, Inc. That publication shows the following rates, in dollar per long ton, for voyage charters of American flag Liberty-type ships for the shipment of heavy grain during the last quarter of 1955, the first quarter of 1957 (the peak of the Suez crisis), and the first quarter of 1958:

Trade Route	Oct.-Dec. 1955		Jan.-Mar. 1957		Jan.-Mar. 1958	
U. S. Gulf—Piraeus	High	18.00	High	20.85		14.50
	Low	16.50	Low	19.00		
North Pacific—Korea	High	17.00	High	18.50	High	13.00
	Low	16.35	Low	18.43	Low	11.00
North Pacific—Formosa		15.85	High	20.25		13.00
			Low	18.50		

Charter rates for American flag Liberty-type ships were substantially lower during the last two quarters of 1957 [fol. 11] than they had been during the second quarter of that year when the petitioner had contracted to sell the *Feuer*. This is reflected in the following rates published by Maritime Research, Inc. for voyage charters of such ships for the shipment of heavy grain or barley (the rate for which is slightly higher than the rate for heavy grain):

Trade Route	Apr.-June 1957	July-Sept. 1957	Oct.-Dec. 1957
S. Gulf—Haifa	19.25	14.00	High 15.00 Low 14.25
rth Pacific—Korea	High 14.75 (barley) Low 14.00 (barley)	High 13.20 Low 11.50	High 11.50 (barley) Low 11.25
th Pacific—Japan	High 13.75 Low 13.35	10.85	High 10.75 Low 10.35
th Atlantic—Poland	13.85	12.00	High 13.25 Low 12.80

By the last quarter of 1957, when petitioner delivered the *Feuer* to its new owner, charter rates for American flag Liberty-type ships were significantly lower than they had been in the last quarter of 1955 when petitioner had purchased the *Feuer*. This is reflected in the following comparison of rates published by Maritime Research, Inc. for voyage charters of such ships for the shipment of heavy grain or barley:

Trade Route	Oct.-Dec. 1955	Oct.-Dec. 1957
U. S. Gulf—Haifa	19.00	High 15.00 Low 14.25
North Pacific—Korea	High 17.00 Low 16.35	High 11.50 (barley) Low 11.25
U. S. Gulf—Karachi	High 24.95 Low 23.40	21.10
North Pacific—Formosa	15.85	13.00

[fol. 12] During the Suez crisis, the United States government encouraged independent owners to build tankers by providing them with extensive financing guarantees. An owner was able to build a tanker with only 12½ percent cash, with the balance payable over 20 years and guaranteed by the Government. During 1957 19 independently owned American flag tankers ranging in dead weight tonnage from 26,500 tons to 67,000 tons were contracted for or under construction. These 19 tankers had a total dead weight tonnage of 731,273 tons, which about equals the total dead weight tonnage (approximately 700,000 to 800,000 tons) of the 70 or so Liberty-type ships trading as tramp vessels under the American flag. These tankers had a speed of about 15½ to 16 knots, much faster than the Liberty-type ships. During the Suez crisis, when these tankers were ordered, the charter rates for oil were high and remunerative. However, by the end of 1957 this was no longer true, and the surplus American flag tankers had begun to carry grain.

The American flag tankers, having greater tonnage and speed, were able to carry grain at lower rates than American flag Liberty-type ships. The rates, in dollars per long ton, published by Maritime Research, Inc. for voyage charters of American flag tankers and American flag Liberty-type ships for the shipment of heavy grain for the same week and same trade route are compared below:

Trade Route	Week Ending	Tanker Rate	Liberty-type Ship Rate(s)
U.S. Gulf—Poland	Sept. 14, 1957	12.50	13.40; 13.50
U.S. Gulf—Trieste	Nov. 2, 1957	13.50	15.35
U.S. Gulf—Karachi	Feb. 2, 1958	17.85	24.25
U.S. Gulf—Turkey	Apr. 4, 1958	11.95	15.50

[fol. 13] By the end of 1957, the business of shipping coal, which had been one of the two principal commodities carried by American flag Liberty-type ships, had about disappeared because of the world-wide increase in oil consumption.

By December of 1957, when the petitioner delivered the *Feuer* to the purchaser, prices for such ships had fallen to the level of from $400,000 to $500,000.

On December 13, 1957, the United States Maritime Administration sold 9 Liberty-type ships for scrapping under a previously extended invitation for bids. Eight of these 9 vessels were sold at prices ranging from $83,000 to $90,388.88. The ninth vessel was sold for $141,241.41, a price attributed by an experienced engineer to an uninformed bid.

The price obtainable for Liberty-type ships for scrapping is determined principally by reference to the price of No. 1 scrap steel, and the cost of preparation, towing, insurance, and other costs of scrapping. A buyer for scrapping is influenced by the estimated future of the scrap steel market because of the time required to prepare and sell the scrap steel. In December of 1957, scrap steel prices were falling. The amount which a buyer could be expected to offer for a Liberty-type ship for scrapping at that time was between $53,000 and $60,000.

[fol. 14]

Opinion

The question is whether under section 167 of the 1954 Code any depreciation deduction is allowable for the period in 1957 during which petitioner used the *Feuer* in its business.

The respondent's position is that since the depreciated cost of the *Feuer* at the beginning of 1957 was less than the amount realized upon sale, there is no basis for allowing a deduction for depreciation for 1957; or, stated differently, that since petitioner recovered before the end of 1957 more than the amount of the depreciated cost at the start of the year, a deduction for depreciation in 1957 is not allowable. Respondent relies on *Cohn* v. *United States*, 259 F. 2d 371 (C. A. 6, 1958); Rev. Rul. 62-92, 1962-1 C. B. 29;[1] *Massey Motors, Inc.* v. *United States*, 364 U. S. 92

[1] The provision in section 1.167(a)-1(c) of the regulations to the effect that salvage value shall not be changed at any time after

[fol. 15] (1960); and *Hertz Corporation* v. *United States*, 364 U. S. 122 (1960).

In his statutory deficiency notice, the respondent failed to state specifically the reason for his determination. His argument here, however, makes it clear that upon auditing petitioner's 1957 return his inquiry was whether a deduction of $135,367.24 for 1957 for depreciation of the *Feuer* was reasonable; he took the view that the reasonableness of the claimed deduction for depreciation depended upon the conditions and facts known to exist at the end of 1957; and he concluded that the fact that the asset, having an undepreciated cost of $326,627.73 at the start of 1957, was

---

the determination made at the time of acquisition merely because of changes in price levels applies to assets still on hand. The provision does not preclude adjustment of salvage value where there is a clear and convincing basis therefor even though no adjustment of useful life is required. The purpose of the provision is to eliminate needless and endless controversies over depreciation allowances which at best are merely informed estimates of the cost of using the property in the taxpayer's business. That purpose has been served when the asset is disposed of and when a final transaction has occurred over which there can be no dispute or difference of opinion or judgment. These rules are and have always been applicable to the allowance of the deduction for depreciation. See *Massey Motors, Inc.* v. *United States* and *Commissioner* v. *Robley H. Evans, et ux*, 364 U. S. 92 (1960), Ct. D. 1847, C. B. 1960-2, 445; and *Hertz Corporation* v. *United States*, 364 U. S. 122 (1960), Ct. D. 1848, C. B. 1960-2, 70.

Accordingly, it is the position of the Service that the *Cohn* case [*Cohn* v. *United States*, 359 F. 2d 371 (C. A. 6, 1958)] applies equally to the 1939 Code and the 1954 Code and that it is not only reasonable but proper to take the ultimate facts into consideration in determining the depreciation deduction for the year of disposition of the asset. Therefore, the deduction for depreciation of an asset used in the trade or business or in the production of income shall be adjusted in the year of disposition so that the deduction, otherwise properly allowable for such year under the taxpayer's method of accounting for depreciation, is limited to the amount, if any, by which the adjusted basis of the property at the beginning of such year exceeds the amount realized from sale or exchange. See also section 1.167(a)-10 of the regulations for rules with respect to when depreciation is allowable.

* * * * * * *

sold before the end of the year for $695,500, made unreasonable any deduction for depreciation for the year of the sale.

Section 167(a) of the Code provides that there shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear of property used in a business; and section 167(b) provides that for taxable years ending after December 31, 1953, "the term 'reasonable allowance' shall include (but shall not be limited to) an allowance computed in accordance with regulations prescribed by the Secretary or his delegate, * * *." The pertinent sections of the Commissioner's Regulations are sections 1.167(a)-1 (a), (b), (c), and 1.167(b)-0. It is not necessary to set forth in their entirety the provisions [fol. 16] of the applicable Regulations other than to state the following:

> 1. * * * The reasonableness of any claim for depreciation shall be determined upon the basis of conditions known to exist at the end of the period for which the return is made. It is the responsibility of the taxpayer to establish the reasonableness of the deduction for depreciation claimed. * * * (Section 1.167(b)-0.)
>
> 2. * * * Salvage value must be taken into account in determining the depreciation deduction either by a reduction in the amount subject to depreciation or by a reduction in the rate of depreciation, but in no event shall an asset (or an account) be depreciated below a reasonable salvage value. * * * (Section 1.167(a)-1(c).)

The petitioner had the burden of proving that the claimed depreciation deduction represents a reasonable allowance under section 167 of the Code. The dispute relates only to the year in which the asset was sold. Petitioner takes the position that it is reasonable to allow a deduction for depreciation for the wear and tear sustained from the *use* of the asset in its business during the taxable year up to the time of delivery to the buyer in December 1957; that granting a reasonable allowance for depreciation through

use is a matter which is separate from computing the gain realized from a bona fide sale; and that respondent's determination involves circuitous reasoning in equating the amount received in a bona fide sale with salvage value with respect to the proposition that an asset shall not be depreciated below its salvage value, under the facts and circumstances of this case in which petitioner, with the advice and consent of the Internal Revenue Service, made [fol. 17] allegedly reasonable estimates just before the time of the acquisition of the *Feuer* of both the useful life in its business of the ship, and of salvage value. In attempting to meet its burden of proof, petitioner presented extensive evidence in support of its original estimate of salvage value in the amount of $54,000. That evidence establishes that due to declining prices of ships, charter rates, and scrap steel toward the end of December 1957, some Liberty-type ships were being sold for scrap at prices between $53,000 and $60,000 at the end of 1957.

Respondent has not questioned petitioner's original estimate of a 3-year useful life of the *Feuer* in its business.

The record does not show that in petitioner's past experience it followed a practice of using ships for a short time and then reselling them. Thus, it cannot be said that it was petitioner's policy "to dispose of assets which are still in good operating condition," in which case "the salvage value may represent a relatively large proportion of the original basis of the asset." See section 1.167(a)-1(c) of the Regulations relating to salvage value.

Petitioner contends that this case is distinguishable from those where the taxpayer did not make any estimate of salvage value when acquiring an asset and left salvage value at zero; and argues that it is to be observed that the Commissioner's resort to resale price as evidence of salvage value in the year of sale probably may be explained by the fact that in those instances the taxpayers had computed their annual depreciation deductions on the basis of an estimated useful life without any estimated salvage value. Cf.

Evans v. *Commissioner*, 264 F. 2d 502, 504, reversed 364 U. S. 92; *Cohn* v. *United States, supra*, pp. 374, 375; *United* [fol. 18] *States* v. *Massey Motors*, 264 U. S. 552, 554, affd. 364 U. S. 92; *Randolph D. Rouse*, 39 T. C. (October 10, 1962).

Petitioner relies primarily upon early authorities, decided before *Massey Motors, Inc.* v. *United States, supra*, and related cases, in which depreciation allowances were allowed in the year of sale and depreciation was regarded as separate from the computation of the adjusted basis of property, and the gain or loss resulting from a sale was arrived at by use of cost depreciated up to the time of sale and sale price. These authorities include the following: *United States* v. *Ludey*, 274 U. S. 295 (1927); *Even Realty Co.*, 1 B. T. A. 355 (1925); *Capital City Investment Co.*, 4 B. T. A. 933 (1926); *Max Eichenberg*, 16 B. T. A. 1368 (1929); *Herbert Simons*, 19 B. T. A. 711, 713-714 (1930); *Thos. Goggan & Bro.*, 45 B. T. A. 218 (1941); and the decision of the issue in *Wier Long Leaf Lumber Co.*, 9 T. C. 990, 999 (1947), affd. and revd. on other issues, 173 F. 2d 549 (C. A. 5, 1949), dealing with depreciation of automobiles (p. 999).

It was stated in the *Ludey* case that the theory underlying the allowance for depreciation is that by using up an asset in a business "a gradual sale is made of it" and the depreciation charged is the measure of the cost of the part which has been "sold" through the use of the asset. Petitioner contends that the "formula" of the *Ludey* case is the keystone of the respondent's depreciation regulations and that his regulations have attempted to stabilize depreciation allowances by "strictly limiting the circumstances under which the useful life and salvage value determined at the time of acquisition of the asset may be changed". Petitioner relies upon the provisions in section 1.167(a)- [fol. 19] 1(b) and (c) which provide that "estimated remaining useful life shall be redetermined only when the change in the useful life is significant" and when "there is a clear and convincing basis for the redetermination"; and that salvage value "shall not be changed at any time after

the determination made at the time of acquisition merely because of changes in price levels." The only circumstance in which the regulations authorize redetermination of salvage value is in connection with redetermination of useful life, in which case "salvage value may be redetermined based upon facts known at the time of such redetermination of useful life."

Petitioner argues that respondent's determination violates the concept which he has adopted in his long-standing regulations that useful life and salvage value are interrelated terms, and that respondent, in attempting to equate sales price to salvage value in every circumstance, has failed to recognize the vital "difference between a dead plant and a live one." *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, 202 (1910).

Petitioner agrees with respondent that an asset may not be depreciated below a reasonable salvage value, but asserts that resale price is not always the measure and equivalent of salvage value. Petitioner argues that "if the taxpayer decides to sell an asset while it is still alive and productive in his business, he is realizing something other than salvage value." Petitioner's contentions emphasize the point that the *Feuer* was sold before the end of its useful life in its business, was not fully depreciated at the time of sale, and fetched a high price when sold because of extraneous economic conditions. In these circumstances, [fol. 20] argues petitioner, respondent should be held to what appears to have been established rules, as follows: (1) "[T]hat in computing the gain from the sale of property a deduction of depreciation during the period of operation shall be made." *Rieck* v. *Heiner*, 25 F. 2d 453, 454, (C. A. 3, 1928), certiorari denied 277 U. S. 608, following *United States* v. *Ludey, supra; Herbert Simons, supra; Duncan-Homer Realty Co.*, 6 B. T. A. 730, 732. (2) "[M]ere appreciation in value due to extraneous causes has no influence on the depreciation allowance, one way or the other. * * * The sole fact therefore in any specific situation that a given price is received for articles not fully

depreciated throws no light on the effect upon the depreciation allowance. * * * The depreciation deduction cannot be disallowed merely by reason of the price received for the article without the consideration of other factors." *Wier Long Leaf Lumber Co., supra,* p. 999.

Petitioner's argument and the authorities relied upon have been fully considered. But the concept of depreciation for tax purposes is rather complex, and changes in economic conditions have brought about new considerations by the courts of the old, well established rules relating to depreciation allowances in the light of the rising market prices of used assets and the corresponding realization of large gains upon the resale of such used assets. For example: The Supreme Court in the cases of *Massey Motors, Inc.,* and *Hertz Corporation* has taken into account the "formula" of the *Ludey* case but it has emphasized the statutory objective of achieving "an accurate determination of the net income from operations of a given business for a fiscal period", and it has clarified the meaning of [fol. 21] "salvage value" by recognizing that under present market conditions "salvage value" must include resale or second-hand value. Thus, in *Massey Motors,* the Supreme Court expressed the view that the Congress "intended that the taxpayer should, under the allowance for depreciation, recover only the cost of the asset less the estimated salvage, resale or second-hand value. This requires that the useful life of the asset be related to the period for which it may reasonably be expected to be employed in the taxpayer's business. Likewise, salvage value must include estimated resale or second-hand value." Also, in *Hertz Corporation* (although dealing with the declining balance system of depreciation), the Supreme Court indicated that it does not comport with the overriding statutory requirement that the depreciation deduction be a *reasonable* allowance, to allow depreciation deductions "beyond what reasonably appears to be the price that will be received when the asset is retired." The facts and circumstances in the authorities on which the petitioner relies must be regarded as distinguishable from the facts and circumstances

of this case when considered in the light of the Supreme Court's reasoning in the *Massey Motors* and *Hertz* cases, recently decided.

This Court in *Randolph D. Rouse, supra,* has indicated the above understanding in its holding that a depreciation deduction is not allowable for the year in which an asset is sold where the sale price of such asset is in excess of the asset's undepreciated cost as of the beginning of the year of the sale. In so holding, it was regarded as determinative that the excess of the sale price over and above the remaining undepreciated cost at the beginning of the year of the sale was substantial. That fact is present in this case. [fol. 22] Also, this Court in the *Rouse* case followed the reasoning in *Cohn* v. *United States, supra,* on which respondent relies. The facts here do not provide the distinction which is required in order not to arrive at the same result as this Court reached in the *Rouse* case. This is observed with full recognition of the point that Rouse at no time made any estimate of the salvage value of the assets involved. In *Massey Motors, Inc.,* also, the taxpayer had not made estimates of salvage values of assets. It is the force of the reasoning about the statutory requirement that to be deductible, depreciation allowances must be reasonable, contained in the opinions of the courts in the *Cohn* and *Massey Motors* cases, and the interpretation of the term "salvage value" as including resale or second-hand value, which compels the conclusion reached by this Court in the *Rouse* case.

Under all of the circumstances, it is necessary to recognize the *Rouse* case as dispositive of the question presented in this case. We are unable to find that in reasoning and principle, there is a valid distinction between the *Rouse* case and this one. It follows that the respondent properly determined that the claimed depreciation deduction for 1957 is not allowable under section 167; the respondent's determination is sustained.

Decision will be entered for the respondent.

[fol. 23]

BEFORE THE TAX COURT OF THE UNITED STATES

No. 88182

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STIPULATION OF FACTS—June 4, 1962

It is hereby stipulated and agreed by and between the respective parties hereto, by their respective counsel, that for the purposes of this case the facts herein stated shall be taken as true, provided, however, that the parties reserve any objection as to materiality or relevance, and that this stipulation shall be without prejudice to the right of either party to introduce upon the trial of this case any other and further evidence not at variance with the facts herein stated.

1. Petitioner, Fribourg Navigation Company, Inc., was incorporated under the laws of the State of Delaware in 1947. Its name was changed from Arrow Barge Company, Inc. to Fribourg Navigation Company, Inc. on January 25, 1957. Petitioner was dissolved on January 17, 1958.

[fol. 24] 2. Throughout its existence, petitioner kept its books and filed its income tax returns on the basis of the calendar year and the accrual method of accounting. It filed its income tax return for the calendar year 1957 with the District Director of Internal Revenue for the District of Lower Manhattan within the time required by law. A copy of such return is annexed hereto as Exhibit 1-A. Petitioner's principal office during 1957 was at 26 Broadway, New York, N. Y.

3. Respondent has determined a deficiency of $71,430.97 in petitioner's 1957 income tax liability.

4. The only determination at issue is respondent's disallowance of a deduction of $135,367.24 claimed by petitioner for depreciation of the SS Joseph Feuer (hereinafter "the vessel"). The vessel was a Liberty-type dry cargo ship (type Liberty EC2-SC1; official number 243521) constructed during 1943 at the North Carolina Shipbuilding Yard for the United States Maritime Commission for emergency use during World War II. Its name at the time of its purchase by petitioner was SS Albion (Ex Polarus Sailor).

5. During the calendar year 1957 and for some time prior thereto petitioner was engaged in the ownership and operation of ships for charter in foreign commerce as carriers of grain or other bulk commodities. During the calendar year 1957 petitioner so owned and operated the vessel and one other ship. Petitioner operated them as tramp ships, *i.e.*, for charter wherever freight was offered [fol. 25] and without a regular or established schedule. Petitioner operated the vessel under the American flag with Wilmington, Delaware as its home port.

6. Petitioner had purchased the vessel on December 21, 1955, from Drytans, Inc. for $469,000 in cash. Drytans, Inc. was not related to petitioner through stock ownership or otherwise.

7. Petitioner operated the vessel under the following charters:

(a) From December 21, 1955 to July 12, 1956, under three voyage charters for the carrying of commodities from the United States to foreign ports:

From	To	Commodity	Duration of Charter
Longview, Wash.	Japan	Scrap	Dec. 21, 1955-March 11, 1956
Longview, Wash.	Haifa, Israel	Grain	Mar. 12, 1956-June 2, 1956
Boston, Mass.	Alexandria, Egypt	Grain	June 3, 1956-July 12, 1956

(b) From July 12, 1956 to April 3, 1957, under time charter to States Marine Corporation.

(c) From April 4, 1957 to December 23, 1957, under three voyage charters for the carrying of commodities from the United States or Cuba to foreign ports:

From	To	Commodity	Duration of Charter
Baltimore, Md.	Korea	Fertilizer	April 4, 1957-June 30, 1957
Los Angeles, Cal.	India	Grain	June 21, 1957-Oct. 8, 1957
Cardenas, Cuba	Casablanca, Morocco	Sugar	Oct. 9, 1957-Dec. 8, 1957

[fol. 26] 8. On June 4, 1957, petitioner entered into a contract for the sale of the vessel to Isbrandtsen Company, Inc. for $700,000, payable $350,000 in cash, $175,000 in the form of a 5 percent note due six months after the closing, and $175,000 in the form of a 5 percent note due one year after the closing. On the same date Isbrandtsen Company, Inc. assigned its rights under the contract to Long, Quinn & Boylan Co., a partnership.

9. The contract of sale provided for delivery of the vessel at a United States Gulf or Atlantic port at petitioner's option between December 1 and December 31, 1957. A copy of the contract is annexed hereto as Exhibit 2-B. Pursuant to the contract, petitioner delivered the vessel to Long, Quinn & Boylan Co. at Hoboken, New Jersey, on December 23, 1957. At the closing the contract was amended to adjust the sales price to $695,500, payable $625,500 in cash and $70,000 in the form of a 5 percent note due one year after the closing. A copy of the amendment of the contract is annexed hereto as Exhibit 3-C.

10. Neither Isbrandtsen Company, Inc. nor Long, Quinn & Boylan Co. was related to petitioner through stock ownership or otherwise.

11. The Office of the Commissioner of Internal Revenue issued a letter dated December 8, 1955 (signed by R. C. Staebner, Chief, Engineering and Valuation Branch, Special Technical Services Division) to Anthony N. Zock, attorney for petitioner, with respect to the useful life and salvage value of the vessel. This letter stated that the Internal Revenue Service would accept a useful economic life of three years from the date of contemplated acqui- [fol. 27] sition of the vessel, and that the cost of $469,000 less salvage value computed at $5.00 per dead weight ton should be spread ratably over such three years. A copy of such letter is annexed hereto as Exhibit 4-D.

12. In computing depreciation deductions for the vessel, petitioner set up a salvage value of $54,000 based on a dead weight tonnage of 10,800 tons at $5.00 per ton. Petitioner computed depreciation on the vessel by spreading the cost of $469,000 less such salvage value, or $415,000, over a useful life of 1096 days, or at the rate of $378.64963 per day under the straight line method of depreciation. Petitioner claimed the following depreciation deductions at such rate and under such method on its income tax returns:

Calendar year	Period of ownership	Depreciation claimed
1955	10 days	$ 3,786.50
1956	366 days	138,585.77
1957	357½ days	135,367.24

13. The dead weight tonnage of the vessel (*i.e.*, its total carrying capacity, expressed in long tons) was 10,800 tons. Its gross tonnage was 7255 tons and its net tonnage 4461 tons.

14. Petitioner's 1955, 1956 and 1957 returns were audited by the Internal Revenue Service. The deductions claimed for depreciation of the vessel on the 1955 and 1956 returns were accepted by the Service without adjustment. The deduction claimed for depreciation of the vessel on the 1957 return was wholly disallowed.

15. The adjusted basis of the vessel as of the beginning of 1957 was $326,627.73.

[fol. 28] 16. The Suez Canal is, in normal times, the busiest interocean canal in the world. In 1888, an international convention agreed that the canal should be open to all nations. For many years prior to 1956 a commission composed mostly of British and French nationals directed management of the canal. On June 13, 1956, Great Britain, pursuant to a 1954 agreement with Egypt, ended its 74-year military occupation of the canal area. On July 26, 1956, Egypt seized the canal over the protest of Great Britain, France and other Western nations. Israel invaded Egypt on October 29, 1956, and Great Britain and France attacked Egypt two days later in an effort to restore international control of the canal. During the hostilities the canal became blocked by sunken vessels. The fighting was ended by United Nations action on November 7, 1956. The United Nations sent a police force to maintain peace in the canal area and also aided in the salvage operations necessary to clear the canal. The canal was reopened for fulltime use on March 29, 1957, under Egyptian management.

Dated: June 4, 1962.

James B. Lewis, Counsel for Petitioner; Theodore Ness, Counsel for Petitioner; Crane C. Hauser, Chief Counsel, Internal Revenue Service.

[fol. 29]

EXHIBIT 4-D TO STIPULATION OF FACTS

[Letterhead of]

U. S. TREASURY DEPARTMENT
WASHINGTON 25

T:S:EP:JHF

Mr. Anthony N. Zock
Zock & Petrie
52 Broadway
New York 4, New York

In re: Arrow Barge Company, Inc.
2 Broadway, New York, N. Y.
SS ALBION (EX POLARUS SAILOR)

Dear Mr. Zock:

This is in reply to your letter of November 29, 1955 in which you request a determination on behalf of your client, Arrow Barge Company, Inc., that the remaining useful economic life of the Liberty-type dry cargo vessel SS ALBION (EX POLARUS SAILOR), which is described in your letters of October 15 and 27, 1955 in the case of Arrow Steamship Company, Inc., will not extend for more than three years beyond the contemplated date of purchase, December 15, 1955, and that the salvage value at that time will not exceed $5.00 per dead weight ton.

You state, "It is now contemplated that Arrow Steamship Company, Inc. assign its contract of purchase with Drytrans, Inc. to its affiliate, Arrow Barge Company, Inc. with all other terms and conditions remaining unaltered except that delivery and Bill of Sale be made to Arrow Barge Company, Inc."

[fol. 30] After consideration of the information furnished in your letter of November 29, 1955 as well as the information furnished in your letters of October 15 and 27, 1955

in the case of Arrow Steamship Company, Inc., including the affidavit of Mr. Harry A. Sperling, Executive Vice President, you are advised that the Internal Revenue Service will accept a useful economic life of three (3) years from the date of contemplated acquisition (December 15, 1955) for the Liberty-type dry cargo vessel, SS ALBION (Ex POLARUS SAILOR). The cost of $469,000.00 at date of acquisition, less salvage value computed at $5.00 per dead weight ton, shall be spread ratably over a period of three (3) years from date of contemplated acquisition, i.e., December 15, 1955.

It is understood that the cost of the vessel is subject to check by the office of the District Director of Internal Revenue and the estimated remaining useful life is subject to such change as subsequent experience may warrant.

This determination is not to be construed as an agreement within the meaning of section 167(d) of the Internal Revenue Code of 1954.

Taxpayer should be requested to attach a copy of this letter to the return in which this permission becomes effective. Two copies of this letter are enclosed for the taxpayer.

Very truly yours,

R. C. STAEBNER
Chief, Engineering and Valuation Branch
Special Technical Services Division

Enclosures
2 copies of this letter

[fol. 31]

BEFORE THE TAX COURT OF THE UNITED STATES

Transcript of Hearing—June 8, 1962 (Excerpts)

IRVING LILLIANTHAL was called as a witness on behalf of the petitioner and, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Lewis:

Q. Mr. Lillianthal, will you state your business?

A. I am the president of Maritime Research, which is an organization which publishes a weekly newsletter detailing all charter fixtures, world-wide.

Q. Will you tell the Court what a charter fixture is?

A. A contract between a shipper and a ship owner for carriage of goods.

Q. What information does your publication distribute as to charter fixtures?

A. It lists the names of the vessels, by nationalities, ports of loading and discharging, dates of availability, and their rates.

Q. Does it show the terms at which the shipment is carried?

A. Yes.

Q. What are those terms as a rule?

A. Well, there are various terms, depending upon who will pay for the loading, the discharging and length and number of voyages, things of that nature.

* * * * * * *

Q. Mr. Lillianthal, does this weekly newsletter contain information as to the amounts that American flag liberty ships receive for shipments?

A. Yes, it includes both American flag vessels and foreign flag vessels.

* * * * * * *

[fol. 32] Q. I show you this schedule and ask you if you have seen it before?

A. Yes, I have.

Q. Did you supervise its preparation?

A. I supervised and checked the information contained herein.

Q. Was the information compiled from your weekly newsletter?

A. Yes, it was.

Q. Will you describe the information contained in the schedule?

A. These are the rates paid—

The Court: Would you like that marked for identification, please?

The Clerk: Exhibit 6 for identification.

(The document referred to was marked Petitioner's Exhibit 6 for identification.)

By Mr. Lewis:

Q. Will you describe the information contained herein?

A. These are the rates paid to American flag liberty type vessels by quarters on certain trade routes for the years 1955 through 1958. That's just the last quarter of 1955.

Q. You mean calendar quarters?

A. Yes.

Q. For the carrying of what commodity?

A. These are all heavy grain shipments. There are some barley shipments included here which are specifically marked. The rate for barley is slightly higher than the rate for heavy grain.

Q. Where there is more than one shipment during a calendar quarter does the schedule show that information?

A. We have shown a high and low for each calendar quarter, so that it would include any shipments which fall between those values, those rates.

[fol. 33] Q. What trade routes have been selected for this purpose?

A. Well, any trade route which shows a fair amount of activity. And we have chosen ten or more weeks in this period to show that. We have included that in this.

Q. By ten or more weeks you mean the number of weeks which there were reports for that trade route?

A. Yes.

• • • • • • •

Q. Did liberty ships operate under a fixed schedule?

A. No, liberty ships, tramp ships being perhaps a better word, don't follow a set schedule.

Q. What kind of voyage does a fixture call for a liberty ship to make, as a rule?

A. Actually, it's what we call a tramp voyage. In other words, there is no set pattern for those vessels. They go wherever cargo calls, or wherever they can get cargo.

Q. Do these fixtures call for a direct shipment of a cargo from one single port to a single port of destination?

A. Yes, these fixtures listed in this particular report show these cargo vessels from one port of loading to one port of discharge.

The Court: Is that what you mean by trade route?

The Witness: Yes.

Q. Will you again state the basis on which the trade routes listed on this schedule were selected?

A. Well, we have tried here to, rather than bring in a bulky report for every American fixture, we have combined these fixtures to show the trade routes which have [fol. 34] the greatest number of activity so we can have a comparison over this entire year. Consequently, what we have done is chosen trade routes where there are ten or more contracts in each one of these quarters. That way we can have a continuity of information over this entire period.

• • • • • • •

By Mr. Hance:

Q. Mr. Lillianthal, what is the source of your information that you have compiled here into this table?

A. Our weekly publication—the information gathered in that publication is obtained from U. S. Government sources from the various brokers, ship owners, charterers, etc.

Q. Do you check this information as to reliability, or anything?

A. Yes, every fixture is checked and double-checked; and, incidentally, from time to time whenever an error does occur a correction is made.

Q. You have "H" and "L" besides these things. Is that high and low?

A. Yes.

Q. What are the figures that have no designation besides them?

A. There are no charter fixtures reported in that period for that trade route in that period.

• • • • • • •

By Mr. Hance:

Q. Can you explain the fact that the price went down and then apparently goes back up again between 1957-1958?

A. Well, there are various reasons why the market goes up and down. I guess the same reasons would hold true in the stock market. Actually, it's a question of supply and demand, normally. During the Suez crisis, of course, you had an artificial situation there.

[fol. 35] The Court: What year was that?

The Witness: That, I believe, was the end of 1956, or early 1957.

• • • • • • •

HARRY SPERLING was called as a witness on behalf of the petitioner and, being first duly sworn, testified as follows:

• • • • • • •

Direct examination.

By Mr. Lewis:

Q. Mr. Sperling, in what field of business activity are you engaged?

A. Steamship operating, and owning.

Q. How long have you been engaged in that?

A. For over 25 years.

Q. During the years 1955 to 1957 were you an officer of the petitioner in this case, Fribourg Navigation Company?

A. Yes.

Q. What was your office?

A. Executive vice president.

Q. What were your duties in connection with that office?

A. I managed the affairs of the company, chief executive officer.

Q. What ships did the company own during this period?

A. The Joseph Feuer, and also the Flying Foam.

Q. Can you briefly describe each ship?

A. The Joseph Feuer is a liberty vessel. The Flying Foam was a C1A.

Q. What is a C1A?

A. A C1A is a smaller ship and a faster one than the liberty types.

Q. To what use did the company put its ships during these years?

A. The Flying Foam was out on a five-year charter, and the Joseph Feuer, wherever cargo presented itself, on a voyage-to-voyage basis.

[fol. 36] Q. What were your duties in connection with the chartering of the vessels? What decisions did you make?

A. The decisions—when to charter the vessel, and at what rates, too.

Q. In connection with the purchase of these ships, were you engaged in the negotiations?

A. Yes.

Q. When did you open negotiations for the purchase of the Joseph Feuer?

A. I would say about a week or ten days prior to its actual purchase.

Q. At that time did you apply to the attorney for the company, or did you authorize the attorney for the company to apply to the Internal Revenue Service for a depreciation ruling?

A. I did.

Q. Late in 1955, when the company acquired the Joseph Feuer, did you have an opinion as to the period for which that ship could continue to be profitably operated?

A. No.

Q. Were you familiar at that time with the operating conditions of liberty ships?

A. Yes.

Q. For what depreciation over what period did you authorize application to be made to the Internal Revenue Service?

A. Three years.

Q. What kind of cargoes were available to the Joseph Feuer?

A. Only government aid cargoes, mainly under Public Law 480.

Q. Could the Joseph Feuer compete with foreign vessels for cargoes in world commerce generally?

A. Absolutely not.

Q. Why not?

A. Because the operation of an American flag vessel prohibited competing with foreign flag vessels, the cost.

[fol. 37] Q. Was the company able to transfer the Joseph Feuer to a foreign flag?

A. No, sir.

Q. Why not?

A. The law prohibited that.

Q. Could the Joseph Feuer obtain return cargoes to the U. S. after it had completed its foreign aid shipments?

A. No.

Q. Did it ever obtain such return cargo?

A. No.

Q. Why could it not do so?

A. The rates were too low to permit an American flag vessel to operate profitably.

Q. Did you handle the negotiations for—

The Court: The rates were too low. What do you mean by that? The rates that would be paid by a foreign shipper?

The Witness: That's right.

The Court: Would you make that clearer?

The Witness: Well, under Public Law 480 there is a 50-50 provision where shippers are required to ship 50 percent on American flag bottoms and the other 50 percent on foreign flag bottoms. The government, in this case the Department of Agriculture, pays the difference between the American flag rate and the foreign flag rate and absorbs that in the form of subsidy.

The Court: That is, in those cases where shipments are made on foreign flag vessels, is that correct?

The Witness: No, where they are made on American flag vessels the rate is generally much higher, and the government pays that difference.

By Mr. Lewis:

Q. In connection with what kind of shipments does the government make such provisions?

A. P.L. 480 grain shipments, Foreign Aid.

[fol. 38] Q. Any other types of shipments?

A. Well, some other commodities, if it's under the P.L. 480 program.

The Court: What is Public Law 480?

The Witness: The law enacted for the disposal of farm surpluses abroad.

The Court: Now, who pays, if you ship farm surpluses to Lebanon, for that shipment?

The Witness: Well, if it is under Public Law 480, the Lebanese would pay for it, but in local currency.

The Court: And they pay at this low rate, or foreign rate, or something like that?

The Witness: They pay the foreign rate, and the government absorbs the difference between the foreign rate and the American flag rate.

The Court: What fixes the American flag rate?

The Witness: Supply and demand. There's a market every day.

The Court: So you, as the operator of a liberty ship, charge for a shipment to Lebanon of a United States farm surplus the current market rate?

The Witness: For American flag vessels, yes.

The Court: I guess you would call them consignees?

The Witness: Yes, consignees or receivers.

The Court: They pay at the foreign rate, and then you make a charge to the Department of Agriculture, probably fill in some forms and ask to have a differential paid by the government, is that correct?

The Witness: Well, the form—you are quite correct that there is such a form, but it is usually made out by [fol. 39] the receiver, the recipient government; they make that form and get that differential, and its own bookkeeping as far as the foreign government is concerned, and—

The Court: It eventually gets to you?

The Witness: We will get the full American rate, but the adjustment is made between governments.

The Court: All right.

By Mr. Lewis:

Q. Are you familiar with the difference in levels between the American and foreign rate?

A. Yes, sir.

Q. Could you state, as of December, 1957, approximately what percentage of the American rate the foreign rate was?

A. I would say that the American rate was probably at least double that of the foreign rate, but I would have to refer to some statistics to know.

Q. And the American rate was available for what kind of shipments?

A. The American flag vessels, the tramp vessels, the only cargoes available were government aid cargoes.

Q. And if the Joseph Feuer were to have taken a cargo from its foreign points of destination back to the United States, then what rate would it have gotten?

A. It would have had to take the foreign flag rate.

Q. Could it operate profitably under the foreign flag rates?

A. No, sir.

Q. Did you handle the negotiations for the sale of the Joseph Feuer?

A. Yes.

[fol. 40] Q. With whom did you conduct those negotiations?

A. Those negotiations were conducted with Jakob Isbrandtsen.

The Court: Do we have that in the stipulation?

Mr. Hance: It's in Paragraph 8, your Honor, I believe.

• • • • • • •

Q. Which party opened the negotiations?

A. Mr. Isbrandtsen.

Q. When did you decide to sell the Joseph Feuer?

A. A few days after we started negotiations.

Q. Why did you decide to sell it?

A. We thought it was an excellent price.

The Court: Did they come to you or did you go to them?

The Witness: In this particular case they came to me.

Mr. Lewis: I have no further questions.

Cross examination.

By Mr. Lewis:

Q. Mr. Sperling, when did you purchase this CIA that you referred to as being one of the ships that you owned?

A. I believe in 1953.

Q. And you purchased the Joseph Feuer in 1955, is that correct?

A. That's correct.

Q. Why did you purchase these vessels?

A. We thought it was reasonable business.

Q. Well, weren't you aware of all these factors you have testified to at the time you purchased them regarding rates and differentials between foreign and American and so forth?

A. Yes.

[fol. 41] Q. The question I am not clear on, you testified that the vessels here, when they are chartered, you cannot get a return charter, is that it?

A. A return cargo.

Q. Well, we show in our stipulation in Paragraph 7, for instance, that the ship was chartered December of 1955—March of 1956, and then the next charter begins one day later, March of 1956. Now, is this the correct duration of this charter, up to March 11, 1956, the first one?

A. Yes.

Q. Does the charter then cover the return trip? Both of these were from the same place?

A. The charter calls for the movement of a particular commodity from point of loading to point of discharge, and that's the number of days it actually took for the vessel to go to its destination, discharge and come back again, in ballast.

Q. Then this is not the duration of the charter, then?

A. That is the duration of the charter.

The Court: The duration of the charter includes the return trip, is what he is saying.

Mr. Hance: I thought he testified that he couldn't get a return charter on the ship.

The Witness: That's correct: it came back in ballast.

COLLOQUY

By Mr. Hance:

Q. But you were paid for the return trip, right?

The Court: Well, what does that mean?

A. We were paid, yes.

The Court: Well, your contract calls for, in this particular instance, taking metal scrap, I suppose it is, from [fol. 42] Longview, Washington, to Japan. You understood, apparently, when you made this contract that your ship would come back empty, except for ballast?

The Witness: That's right.

The Court: Now, in fixing the charge for the shipment, and this is done under market terms, according to the market, what do you charge when you are going to send a ship to a port with cargo and bring it back empty except for ballast?

The Witness: Well, of course, the rates that you obtain for a particular cargo is a matter of supply and demand, and there is a market for it every day.

The Court: Well, we want to get that right there. There is such a thing as a rate for a cargo?

The Witness: Yes.

The Court: And what you are going to charge here is a rate for charging a cargo of scrap?

The Witness: Which, in each case, is negotiated with the charterer, and I think you will find in that Maritime Research the various fixtures every day, or over a given period, and they have a range. Now, when we calculate as to what voyage we would like to take, or do, the last voyage is always calculated as a cost item, so in fact even the Maritime Commission's own bookkeeping setup stipulates that a voyage on their vessels is a complete round trip, come back in ballast. That's the government's own accounting setup, which we follow.

[fol. 43] The Court: Does that clear that up, Mr. Hance?

Mr. Hance: I think so, your Honor.

By Mr. Hance:

Q. Mr. Sperling, did that first charter come under this public law you referred to, this scrap?

A. No.

Q. Do you know whether this public law is still in existence?

A. Yes, sir, it's still in existence.

Q. I wonder do you know how long Mr. Isbrandtsen has been president of Isbrandtsen Company?

A. From May 13, 1953.

Q. Could you tell the Court the business of the Isbrandtsen Company?

A. Isbrandtsen Company is a large American steamship company.

Q. You mean they are owners?

A. Owners, and presently are in control of the American Export Lines.

Q. What use would Isbrandtsen have for a vessel such as the Joseph Feuer?

A. I have no idea.

Q. Well, do they operate these vessels? Would they operate such a vessel?

A. They have operated vessels of that type.

Q. When you were negotiating with them, then, you didn't know why they wanted to purchase it?

A. No.

Q. Do they charter these vessels to third parties?

A. I don't know what they did with them. I would have to go over the records to answer that.

Q. Well, you are familiar with the nature of their business, right?

A. Yes.

Q. And you say they owned this type of vessel, freighter?

A. Yes.

Q. But you don't know whether they operate them [fol. 44] themselves or put them out on charter as you do?

A. I presume they would do the same as we would.

Mr. Hance: That is all, your Honor.

The Court: Going back to Paragraph 7 of the stipulation, Paragraph 7(a), it is my understanding that the parties are agreed that the charters referred to there in—there are three charters—beginning in December of 1955 and going to July 12th of 1956, and in each instance the liberty type ship involved here came back with an empty bottom, is that correct?

The Witness: That's right. Came back without any cargo at all.

Mr. Lewis: Well, that is not stipulated, but I gather it is correct, from the testimony, your Honor.

The Court: No, that is not stipulated. I am asking you if counsel are agreed now that that is a fact.

Mr. Hance: I believe that is what Mr. Sperling testified to.

The Court: Well, you understand that in that way, do you?

Mr. Hance: Yes, your Honor.

* * * * * * *

Mr. Lewis: Well, earlier the Court had inquired as to a breakdown of the operating income on the 1957 return, between that of the Joseph Feuer and of the second vessel, the Flying Foam. I can put an additional witness on for a minute to supply that information.

The Court: All right.

Mr. Lewis: Mr. Saul Binderoff, please.

[fol. 45] SOLOMON BINDEROFF was called as a witness for the petitioner and, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Lewis:

Q. Mr. Binderoff, what is your occupation?

A. Presently?

* * * * * * *

Q. Well, in 1957. I was chief accountant for Fribourg Navigation.

* * * * * * *

Q. I show you Joint Exhibit 1A. Can you state from this exhibit the total operating income reported before deductions for salaries and depreciation?

A. Yes.

Q. What is that amount?

A. On Page 2, Line 15, where it indicates total income, the breakdown is that the Joseph Feuer would show—

Q. Would you give the figure on the line, please?

A. It shows $391,811.31.

Q. How does that breakdown between the two vessels?

A. The Joseph Feuer showed $289,411.31. The Flying Foam showed $102,400.

* * * * * * *

ANTHONY ZOCK was called as a witness on behalf of the petitioner and, being first duly sworn, testified as follows:

* * * * * * *

[fol. 46] Direct examination.

By Mr. Lewis:

Q. Mr. Zock, are you admitted to the practice of law in New York?

A. I am.

Q. How long have you been admitted?

A. About 22 years.

Q. During the years 1953 to 1957 did you perform legal work for the petitioner in this case?

A. Yes, we did.

Q. In 1955 did you apply to the Internal Revenue Service for a ruling on the depreciation of the Joseph Feuer?

A. Yes.

Q. Had you applied for similar rulings for this and other clients in the past?

A. Yes.

Q. Is the representation of steamship owners and operators a substantial part of your practice?

A. It is.

Q. And was it during the years 1953 to 1957?

A. It was then and is now.

Q. As part of your legal practice have you kept informed as to the ruling policies and practices of the Internal Revenue Service with respect to ship depreciation?

A. Yes.

Q. In the summer of 1955 did you inform Mr. Sperling as to the then practice of the Internal Revenue Service with respect to liberty ship depreciation?

A. He consulted me on that and I so informed him.

Q. What was that practice?

A. With respect to liberty ships at that time it was the practice to grant rulings of a similarity to the one that we obtained—three years.

Q. Were those rulings based on useful economic life?

A. Yes.

Q. And what salvage value did those rulings provide?

A. Five dollars.

Q. What does "five dollars" mean?

A. Five dollars per dead-weight ton.

• • • • • • •

[fol. 47] Q. This was the salvage value that had been provided in earlier rulings before you applied in this case?

A. It was.

Q. And the three-year economic life had been also provided by the earlier rulings?

A. Yes.

Q. Did you obtain a ruling in 1955 for this petitioner as to depreciation of the Flying Foam?

A. I did.

Q. What ruling did you obtain in that case?

A. The Flying Foam was not a liberty type vessel. It was a C-1 type vessel, and the ruling which we ultimately obtained was one which was calculated on the basis of a 20-year life from the date of construction. Approximately eleven years from the date of the acquisition of the vessel. We had applied for a seven-year life from the date of acquisition, but the ruling provided for an eleven-year life.

Q. Was this expressed in terms of useful economic life?

A. Yes, it was, and salvage value.

Q. Do you have that ruling?

A. I don't have the ruling on that. I believe Mr. Binderoff has that.

The Court: While counsel is looking for that document, tell me what you mean by C-1 type?

The Witness: That was a designation given to vessels constructed of that type by the Maritime Administration during the war. It was a war-built type of vessel, but it was of a smaller design, better engine type, and it had different characteristics than the liberty ship.

The Court: It was a cargo vessel, though?

The Witness: Yes, a dry cargo vessel.

[fol. 48] By Mr. Lewis:

Q. I show you this document and ask you if this is a photostatic copy of the ruling you obtained on the matter of the Flying Foam.

A. Yes, it is.

Mr. Lewis: May I have this marked for identification?

The Clerk: Exhibit 7 for identification.

* * * * * * *

Q. Will you read from the second paragraph thereof?

* * * * * * *

A. "After consideration of the information furnished in your letters and office conferences on September 16th and 21, 1953, and the affidavit of Harry S. Sperling, you are advised that the Internal Revenue Service cannot accept a seven-year life from date of purchase, but will accept a useful life of 20 years from date of construction termination, October 10, 1946, for the C-1B type steam turbine dry cargo vessel, the Flying Foam. The cost of date of acquisition, expected to be October 10, 1953, less salvage value, computed at five dollars per dead-weight ton shall be spread over the period ending October 10, 1946."

Q. And this was eleven years from the date of acquisition?

A. Yes.

Q. Will you go back to the statement of useful life, the statement that the Service will accept, and read that.

A. "But will accept a useful life of 20 years from date of construction."

Q. I asked you earlier whether this letter was based on useful economic life. Would you care to reply to that again?

A. I guess it was, as stated, the useful life of the vessel.

• • • • • • •

[fol. 49] COLLOQUY

The Court: Is there a difference between useful economic life and useful life in the vernacular, Mr. Lewis? Under the regulations what is the expression used?

Mr. Lewis: The regulations do not use the expression "useful economic life."

The Court: What expression does the regulation use?

Mr. Lewis: "Useful life."

The Court: What about the statute?

Mr. Lewis: It provides for a reasonable allowance for depreciation, and then states parenthetically, including allowance for obsolescence.

The Court: What are you getting at now? The expression that you use and refer to now, have several times what is the expression you are using?

Mr. Lewis: The expression "useful economic life" appears in the ruling issued on the liberty ship.

The Court: For purposes of this present examination in Exhibit 7 for identification the words "useful economic life" are not used.

Mr. Lewis: No, "useful life" is used in connection with the remaining eleven-year life, but "useful economic life" is used with reference to the three-year life remaining with reference to the liberty ship.

The Court: And you are contending that the expression is—

Mr. Lewis: Mean different things, your Honor.

The Court: Now, with respect to obsolescence, what is the point you are getting at there?

[fol. 50] Mr. Lewis: The Commissioner's regulations make it clear that obsolescence may be based on economic factors. Petitioner will hope to demonstrate that the eco

nomic outlook did confirm the short economic useful life the Commissioner ruled for liberty ships and—

The Court: You are going to take the position that the expression "useful economic life" comprises depreciation and obsolescence?

Mr. Lewis: Yes, or where obsolescence exceeds depreciation, your Honor, it simply supplants it, and absorbs it. We will present evidence to show the obsolescence of these vessels, and we contend that in issuing the 1955 ruling the Commission recognized that obsolescence allowances were appropriate for these vessels, by allowing only a three-year life and referring to the economic life.

The Court: All right. Do you have any other questions?

Mr. Lewis: No further questions.

Cross examination.

By Mr. Hance:

Q. Mr. Zock, when did you first obtain a ruling with respect to a liberty type vessel for a client?

A. I am not sure of the exact date. It was somewhere around 1949, I believe.

Q. What useful life were you requesting at that time?

A. Three years.

Mr. Hance: That is all, your Honor.

The Court: And that was in connection with a C-1—

[fol. 51] The Witness: No, in connection with another liberty type vessel for another client.

The Court: Mr. Hance, you asked this witness if he had ever gotten a different ruling—

Mr. Hance: No, the first time he requested a ruling on a liberty type vessel for a client.

The Court: And it was in 1959 and he got a ruling and in that ruling—

Mr. Hance: He requested—

The Court: And was allowed a three-year what?

The Witness: Useful economic life.

The Court: That was the expression used?

The Witness: Yes.

• • • • • • •

WALTER LEIBUNDGUT was called as a witness on behalf of the petitioner and, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Lewis:

Q. What is your occupation?

A. I am engaged in the steamship business.

Q. How long have you been engaged in that business?

A. About 25 years.

Q. Were you an officer of the petitioner in this case, Fribourg Navigation Company?

A. Yes.

Q. In 1955 and 1957?

A. I was.

Q. What office?

A. Vice president.

Q. Would you describe your official duties?

A. I was in charge of chartering and operating details, under the direction of Mr. Harry Sperling.

[fol. 52] Q. In connection with the chartering of a vessel did you compute operating costs?

A. I did.

Q. In what manner did you make these computations?

A. Well, we would calculate the voyage, or the anticipated voyage, in order to decide which voyage was most profitable.

Q. What factors did you take into account?

A. We took the cost of the vessel, cost of fuel, port charges and stevedoring and all miscellaneous items pertaining to cost of operation, plus anticipated revenue.

Mr. Lewis: May I have this document marked for identification?

The Clerk: Exhibit 8 for identification.

(The document referred to was marked Petitioner's Exhibit 8 for identification.)

By Mr. Lewis:

Q. I show you this schedule and ask you if you are familiar with it.

A. Yes, I am.

Q. Can you describe the information on it?

A. Well, this is information compiled in our office that concerns the actual cost of operating an American flag liberty ship. We have wages, including overtime and vacation, pension and welfare fund of $868. We have subsistence charges of $59, deck engineer and stewards' supply, $63, maintenance seven dollars, repairs $218, and insurance, including deductibles, $113, miscellaneous, $19, making a total of $1347 per diem.

Q. That is the daily cost of operating the vessel?

A. Yes.

Q. As of what period was this compiled?

A. 1957.

[fol. 53] Q. To what vessel did the figures relate?

A. To the SS Joseph Feuer.

Mr. Lewis: I offer this in evidence.

Mr. Hance: No objection, your Honor.

The Court: Received as Exhibit 8.

(The document heretofore marked Petitioner's Exhibit 8 for identification was received in evidence.)

Mr. Lewis: I would like these documents marked for identification.

The Clerk: These are Exhibits 9, 10 and 11 for identification.

(The documents referred to were marked Petitioner's Exhibits 9 through 11 for identification.)

By Mr. Lewis:

Q. Mr. Liebundgut, I show you three voyage estimates and ask you if you prepared these.

A. Yes, I did.

Q. Will you explain the computation on the estimates?

A. Surely.

Q. Take No. 9 first and describe that.

A. No. 9 is an estimate made for voyage starting in Galveston, Texas for a cargo of wheat to be loaded in Galveston and discharged in Haifa. It's a normal calculation that was made prior to our taking any particular cargo, and on it we calculate, number one, the number of tons of cargo we expect to lift. We then take this quantity and extend it by the freight rate and this particular case it's $15, making a gross revenue of $149,175. [fol. 54] and deduct commission of two and a half percent, making that revenue $145,446.

We then calculate how long we expect it to take to load and to grain-fit the vessel and we have allowed seven days. We divide the speed of the vessel into the miles of the voyage and we find we take 29 days to get to Haifa. We have allowed four days to return.

Discharge, 29 days to return and a normal allowance of spare seven days, making 76 days total voyage at the cost of $1347, or total cost of $102,372.

We have allowed bunkers calculated at the rate of 25 tons per day at sea and five tons per day at port, or a total of 1505 tons at the then cost rate of $32,735.

Q. What is a bunker?

A. Fuel oil consumed by the vessel. We then charged this calculation with the port charges both at Galveston and Haifa, as we know them to be, as well as charging stevedoring, loading and the necessary expenses for fitting the vessel and our normal spare, and we found the cost was $148,857, making a net loss for the round voyage of $3411.

Q. Does Exhibit 10 relate to a different voyage?

A. Yes, it does. Exhibit 10 is a calculation made from Galveston, Texas to Poland.

Q. Made in the same manner as Exhibit 9?

A. In exactly the same fashion.

Q. What net result does it show?

A. A profit of $1500.

Q. And Exhibit No. 11?

A. Exhibit 11 is again of cargo being loaded in Galveston of bulk wheat destined for Karachi and here we show a loss of $5636.

Q. Were the various elements of cost you used in making these estimates based on the costs of the SS. Joseph Feuer in the latter part of 1957?

A. Yes, they were.

[fol. 55] Q. On what are the projected revenue from the voyage based?

A. The revenues were based on the rates that were actually chartered during this period.

Q. Were these actual voyages of one of your liberty ships? Do these cover actual voyages by an actual ship?

A. No, it does not.

Q. But they are projections based on charter rates and expenses as of the close of 1957?

A. That's correct.

Mr. Lewis: I offer Exhibits 9, 10 and 11 in evidence, your Honor.

Mr. Hance: No objection, your Honor.

The Court: They are received in evidence.

(The documents heretofore marked Petitioner's Exhibits 9 through 11 for identification were received in evidence.)

Mr. Lewis: Your witness.

Cross examination.

By Mr. Hance:

Q. Mr. Leibundgut, when did you prepare those estimates?

A. These were made a few days ago.

Q. Did you include in those estimates any cost for depreciation?

A. No, sir.

* * * * * * *

MACK KLOSKY was called as a witness on behalf of the petitioner and, being first duly sworn, testified as follows:

* * * * * * *

[fol. 56] Direct examination.

By Mr. Lewis:

Q. Mr. Klosky, in what business are you engaged?

A. In the chartering/brokerage business.

Q. How long have you been in that business?

A. In this particular field of the business, 14 years.

Q. What was your business before that?

A. Well, in 1936 I was vice president of a steamship company engaged in the owning and operation of vessels and running of berth liners.

The Court: What was the name of the company?

The Witness: T. J. Stevenson & Co., Inc., originally doing business under the name of Bulk Carriers Corporation and subsequently became T. J. Stevenson.

By Mr. Lewis:

Q. Will you describe your present activities in the chartering of vessels?

A. Well, we are cargo brokers, and we represent chiefly grain exporters, commercial grain exporters, and we are the exclusive representatives of several foreign governments, and our office is engaged in the chartering of vessels in world-wide transportation of bulk commodities.

Q. Have your activities made you familiar with the operation of liberty ships and their chartering, American flag liberty ships?

A. Yes, sir.

Q. In 1957 can you tell the Court how the speed of a liberty ship compared with that of a more modern post-war vessel?

A. Well, perhaps I can best answer that by saying that the speed of liberty ships has really never changed since

[fol. 57] the day they were launched. They were constructed for 9½ to 10-knot speeds, and the average liberty ship today is still cruising at about ten knots, and the modern cargo tramp ship of today, of recent construction, is anywhere from 14 to 18 knots.

* * * * * * *

The Court: Well, what is there about a liberty ship that puts it in a class by itself? You have mentioned, one, that they were constructed for not more than 10-knot speed. Now, that has to do with the boilers or engines on the ship, I suppose.

The Witness: Well, if you will recall, your Honor, during the war we had this tremendously accelerated construction program. We launched a ship a day at every yard in the country, and they put out what was called the EC-2. The liberty ship is known as the EC-2. They were constructed practically on identical dead weights with slight variations in construction, depending on what shipyard they were, west coast or east coast or Gulf port, for the purpose of getting cargoes as quickly as they could to the other side.

The Court: They were made of steel, though?

The Witness: They were steel and welded ships, although in one or two yards they occasionally used some riveting to a minor extent. But because they were welded they broke up later.

By Mr. Lewis:

Q. How do the engines compare with modern ships?

A. Well, the liberty ships were constructed of Scotch [fol. 58] boiler type, consuming fuel oil and having three main boilers and a single propeller and their top speed was about 10½ knots. The new ships today are superheated turbines, high-pressure systems, and there is just no comparison.

Q. How do the two compare as to cargo handling and storage facilities?

A. There is no comparison in that either. The liberty ship has a cubic bail space of approximately 475,000 feet for a vessel described as about 10,500 tons dead weight, meaning her total carrying capacity of cargo, fuel, stores, water and special fittings and everything. Whereas today a modern 10,000-ton ship of the same dead weight will have a cubic capacity of 600,000 feet. In other words, they will carry much more cargo at a much faster rate of speed and carry it more efficiently and load it faster and discharge faster.

Q. What types of cargoes were American flag liberty ships capable of handling?

A. Well, they handled everything during the war, from tanks and landing barges to bulk commodities. That is what they were designed for, to carry everything as a war-time expedient. Not that they did the job well.

Q. What did they carry in post-war commerce under private ownership?

A. Well, they gradually drifted down to the low-paying bulk commodities—grain, sulphur, potash, coal, scrap iron.

Q. What was the principal commodity carried?

A. Coal and grain.

Q. Was the American flag liberty ship facing competition in the carriage of grain by the end of 1957?

A. Yes, they are facing it today, too.

[fol. 59] Q. What was the nature of that competition?

A. Well, the competition has varied in recent years. First—

The Court: Well, we are concerned now with the end of 1957.

The Witness: Well, in 1957 the tankers, vessels which had been primarily designed and intended for the transportation of bulk oil, entered into the bulk dry cargo field, and they began taking grain at sharply reduced rates.

Q. You have mentioned coal as the second important commodity. Were any factors developing as to shipments of coal by the end of 1957?

A. Well, the coal business has just about disappeared with the world-wide increase in oil consumption, so coal no longer became the backbone of the market. Grain did.

Mr. Lewis: May I have Exhibit 6, please.

(Exhibit handed to Mr. Lewis.)

Q. Mr. Klosky, are you familiar with the charter rates in effect for shipment of heavy grain on American flag liberty ships during the years 1955, 1956 and 1957?

A. Yes.

Q. May I show you this chart to refresh your recollection (handing to witness). How did the charter rates in effect that were being obtained for such vessels in December of 1957 compare with those obtainable in the summer of 1957?

A. In December of 1957 and the summer of 1957?

Q. Yes, comparing December of 1957 with six months earlier.

A. Well, there was a sharp drop. The peak was coincidental with Suez, and thereafter it continued to drop [fol. 60] year after year, so specifically answering your question, December of 1957 was lower than the summer months of that year.

Q. Can you furnish an example of the spread?

A. Well, yes. Here is a case where in June of 1957 U.S. Gulf to Haifa paid $19.25 a ton, and in the same year, December, it paid $15 a ton, or a drop of $4.25 a ton.

Q. How did the rates in December of 1957 compare with those of two years earlier when the petitioner had purchased the Joseph Feuer?

A. December 1957 back to December of 1955?

Q. Yes.

A. Again, 1957, December, was considerably higher than the rates prevailing in December of 1955.

Q. What reasons do you ascribe to the sharp drop in rates between December of 1955 and the close of 1957?

Mr. Hance: I didn't understand the question, your Honor.

Mr. Lewis: The petitioner testified in answer to the question before the last one that rates, charter rates, at which American flag liberties, could be had in December of 1957 were far below those in June of 1957, and I have asked him for his opinion as to the reasons for that drop.

A. Well, it was a combination of the diminishing of the world tension, the entry into the market of large modern vessels, and the entry into the market of tankers which carried twice the amount of grain that a liberty ship could carry, at less money.

Q. Are you familiar with the operation of liberty ships by the various companies for whom you fix charters?

A. Yes, I believe so.

[fol. 61] Q. Can you tell us the purpose for which the Isbrandtsen Company was using its liberty ships in 1957?

A. Well, I would say almost exclusively in the tramp field to carry grain and grant-in-aid cargoes, and perhaps occasionally, if they ever got into trouble in a certain position, they might put one in to supplement their liner fleet. But basically for tramping.

Q. Was this the same purpose the petitioner used Joseph Feuer for?

A. Yes.

* * * * * * *

Robert Pierot was called as a witness for the petitioner and, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Lewis:

Q. Mr. Pierot, what is your business?

A. I'm a broker for the sale and purchase of ships.

Q. With what company?

A. Jack Pierot, Jr., & Sons.

Q. Are you an officer?

A. I am a partner of that company.

Q. How many years have you been associated with the company?

A. A little over ten years.

Q. Does your business require you to keep informed as to the volume of ship construction from time to time?

A. It does.

Q. In your business do you arrange contracts for the construction of ships?

A. I do.

Q. And what other types of contracts do you participate in?

A. We arrange for sale and purchase of secondhand [fol. 62] ships, of new vessels, and the general line of our business also includes appraising, and we generally keep a record of vessels that are available for sale, and of course, of potential buyers.

Q. In the conduct of your business do you keep and maintain records of ships ordered for construction?

A. Yes, I do.

Q. Can you state the approximate tonnage of American flag tanker construction on order as of December 31, 1957?

Mr. Hance: Your Honor, I object to the question. He is inquiring as to the tonnage of tankers.

Mr. Lewis: On order.

Mr. Hance: Well, I don't think the size of the tanker fleet or anything is relevant to this case.

Mr. Lewis: Your Honor, the preceding witness has testified that the tankers were invading the dry cargo grain market and were undercutting liberties.

The Court: Objection is overruled.

A. Yes, I have a record of the independently owned tankers on order in 1957. I say independently because I do not keep a record of the ships ordered by the oil companies, which generally do not come on the market for sale until ten, fifteen years later.

Mr. Lewis: I would like this document marked for identification.

(The document referred to was marked Petitioner's Exhibit 12 for identification.)

By Mr. Lewis:

Q. Did you prepare this list from your business records?

A. Yes.

[fol. 63] Q. Will you describe that?

A. It's a list which states the names, year of completion, and dead weight tonnage of the independently owned tankers under construction, or contracted for, during 1957. It shows a total dead weight tonnage of 731,273 tons.

Q. Do you have any opinion as to how this compares with the tonnage of the America flag liberty ship at that time?

A. Well, contrary to what the preceding witness just said, my records show that in the tramp fleet at the end of 1957 approximately 70 liberties were trading under American flag.

Q. What tonnage would that represent?

A. That would represent a total tonnage of approximately 700,000 tons, plus a fraction, maybe 800,000 tons, with a speed of approximately ten knots; while here we have 731,000 tons with a speed of approximately 15½ to 16 knots.

Q. Was this an unusual level of tanker construction?

A. Yes.

Q. What had led to it?

A. During the Suez crisis the United States Government encouraged independent owners to build tankers by providing for them extensive financing guarantees. An owner was able to build a tanker with only 12½ percent cash, and the balance to be paid over 20 years, and that balance would be guaranteed by the United States Government. The United States Government felt that during Suez there would be a requirement for modern tankers, which, unfortunately for the market, has proved wrong.

Q. Did this create a surplus of tankers for the carriage of oil?

A. Yes, this became apparent, I think, during the last [fol. 64] quarter of 1957, or even before that. See, when

these tankers were ordered the rates that these tankers could obtain for carrying oil were quite high and remunerative, while during the end of 1957 these rates had already gone to a point where an owner could not make any money and could not make his payments on some of these ships.

Q. To what use were the tankers being put by the end of 1957?

A. By the end of 1957 there were quite a few tankers engaged in grain trade, surplus tankers which could find no business in the oil trade would carry grain.

Mr. Lewis: I offer this paper in evidence.
Mr. Hance: No objection.
The Court: Exhibit 12 is received.

(The document heretofore marked Petitioner's Exhibit 12 for identification was received in evidence.)

By Mr. Lewis:

Q. Mr. Pierot, you stated you were familiar with the prices at which secondhand ships sell.

A. Yes.

Q. The parties in this case have testified that the Joseph Feuer was contracted to be sold in June of 1957 for $700,000. Is this representative of liberty ship prices at that time?

A. Yes, it is.

Q. How does this compare with liberty ship prices in December of the same year?

A. In December of that year liberty ships were sold at four and five hundred thousand dollars.

Q. To what cause do you attribute the drop in prices?

A. The inability of a liberty vessel to make any money, and its trading activities.

[fol. 65] Q. And to what do you attribute the $700,000 price level in June of 1957?

A. Pure optimism. Let's say I think I can elaborate on that a little bit more. During Suez the prices for liberty ships, say in January of 1957, would have reached, if such ships were available for sale with prompt delivery, probably about a million dollars. In the shipping business as

in all other markets, without too much success, we tried to maintain an orderly market, and it comes down gradually. Say the 700,000 was the mid-point between the million dollars and $500,00 at the end of the year.

Mr. Lewis: Thank you. No further questions.

• • • • • • •

Cross examination.

By Mr. Hance:

Q. Mr. Pierot, when you are speaking of tankers, are you referring just to American flag vessels?

A. Yes, I am.

Q. These new ones that you referred to that were under construction—generally, what was the size of these ships?

A. They ranged in size from—the smallest was 28,000 tons, approximately and the largest was about 67,000 tons.

Q. And who, what companies, were building these ships?

A. Private tramp owners, I can give you—these are all independent owners, and most of them were also running other dry cargo vessels, but few of them had tankers before, and the only reason they built the tankers was that the government was giving such generous guarantees for the loans.

Q. You say it was connected with the Suez crisis?

A. Yes.

Q. Was that because of the demand for tankers to bring oil from the Middle East? Is that correct?

A. Yes, that's correct.

[fol. 66] Q. Mr. Pierot, you estimated that there are about 70 vessels in the American fleet as of the end of 1957?

A. Privately owned tramping fleet, yes.

Q. Well, I just wonder. The Commerce Department advised me that there were 88 of these vessels plus about four that had been converted to bulk carriers. Would you have any idea why the difference in your figures?

A. I think I qualified privately owned vessels in the tramping market. There are some liberties which are engaged in special trades, for example, the Alaska Steamship Company, which is not necessarily considered in the

tramping business because they have a scheduled run to Alaska. I think the Bull Line is not considered in the tramping trade because they have a scheduled run to Puerto Rico, and I think this will account for the 18 liberties.

Mr. Hance: I see. Thank you very much.

COLLOQUY

The Court: Will you refresh our recollection about the period of the Suez Canal crisis?

The Witness: Well, in the shipping market when we speak about the crisis, I think we would be referring to January of 1957, because that was the height of the market. Of course, the Suez Canal blockage was much before that.

The Court: What happened to the market in January of 1957?

The Witness: It was at its peak.

The Court: Which market, the shipping—

The Witness: The rates for shipping, and also the prices of ships. That would be January and February of 1957.

[fol. 67] The Court: Well, the political crisis began when?

The Witness: I think it was October, November, 1956.

The Court: And the political crisis provided a stimulus to the building of ships, is that right?

The Witness: Well, partly yes, but not quite. It was also the blockage of the Suez Canal, which necessitated a much longer trip for tankers to carry oil to the Persian Gulf or the United States or the United Kingdom and the European continent.

The Court: So those engaged in the shipping business were making more money because the ships had to take longer trips?

The Witness: Yes, but not just because the ships had to take longer trips. But there was a scarcity of available tonnage to move cargo, which scarcity, of course, drives up the freight rates. The saying in the shipping business is 100 ships and 101 cargos makes good rates.

The Court: The fact that they had to take longer trips also created a scarcity of ships?

The Witness: Yes, they carried the same cargoes but it took them longer to complete a voyage.

The Court: So if it took them twice as long to complete a voyage you would need twice as many ships to carry the same amount of cargo, and that caused a rise in freight rates, and a rise in what ships were selling for, bringing in the market?

The Witness: That's right.

The Court: And the peak of this economic effect was in January and February of 1957?

[fol. 68] The Witness: Yes.

The Court: Then it began to fall off. Will you explain that?

The Witness: Well, the reason it started to fall off, of course, was that, number one, the governments in Europe had stockpiled in anticipation of a long delay in the opening of the Suez Canal. It stockpiled various commodities. I can state, for example, in Holland the government wrote to every consumer of oil asking them how much oil they had on hand, how much they consumed per year, and based on these facts they went to the oil companies and said, stockpile so many tons of oil. Of course, what happened with the Dutch citizen there is that they were afraid of rationing, and therefore, when asked the question how much oil they had on hand, they only stated about 50 percent of what they had on hand, and consumption, on the other hand, they stated at 200 percent, so the forecasts were completely incorrect, and all of a sudden the European countries found themselves with tremendous stockpiles and unable to find a place to put the goods any more. So as soon as this became apparent, of course, the activity of carrying goods slowly ground to a halt, and consequently the need for bottoms, or tonnage to carry these goods, was no longer there, and the charter rates dropped off.

The Court: The demand decreased?

The Witness: That's correct.

The Court: Well, that is very interesting. Anything further.

Mr. Lewis: Nothing, your Honor.

[fol. 69] The Court: Thank you very much, sir. You are excused.

* * * * * * *

MICHAEL J. NASSAU was called as a witness on behalf of the petitioner and, being first duly sworn, testified as follows:

• • • • • • •

Direct examination.

By Mr. Lewis:

• • • • • • •

Mr. Lewis: I would like this document marked for identification.

(The document referred to was marked Petitioner's Exhibit 13 for identification.)

Q. I show you a schedule of charter rates covering the years 1957 and 1958 and ask you if you prepared that.

A. Yes, I did.

Q. Will you describe the sources from which it was taken?

A. Yes, this was prepared from the weekly bulletins prepared by Maritime Research, which was described earlier by Mr. Lillianthal.

Q. What information does this schedule contain?

A. The schedule shows each week in which there was a fixture, a charter fixture, for heavy grain by both American flag tanker and American flag liberty-sized vessel, and it shows the name of the vessel, the tonnage, commodity, terms, dates, and also the rate. The main purpose was to compare the rate at which a tanker would charge for a shipment and the rate which a liberty-size vessel would charge for that same shipment over the same trade route.

[fol. 70] Q. How did these rates compare?

A. In every case the tanker rate is lower, and on the chart you can see the differences because the tanker rate is starred and the liberty-size vessels are not—and they are next to each other.

Mr. Lewis: I offer this schedule in evidence.

• • • • • • •

ROBERT E. SORENSEN was called as a witness for the petitioner and, being first duly sworn, testified as follows:

* * * * * * *

Direct examination.

By Mr. Lewis:

Q. What is your profession?

A. I'm the head of the marine engineering department for Luria Brothers.

Q. How many years of experience have you had in this work?

A. Fifteen with Luria Brothers and 16 prior to that with others.

Q. What are your duties?

A. Presently, and mainly, the figuring of ships for dismantling, scrapping, and I also specialize in handling special cargoes.

Q. Does your company enter bids for ships for scrapping?

A. Constantly.

Q. Did it do so in 1957?

A. Yes, it did.

Q. Does your profession require you to be familiar with the scrap values of ships?

A. Yes.

Q. Have you an opinion as to the scrap value of an American flag liberty ship in December of 1957?

[fol. 71] Mr. Hance: Your Honor, I object to these questions. I don't see the materiality of the scrap value of this vessel in trying to determine its salvage value in 1957.

The Court: The objection is overruled.

Q. What is that opinion?

A. Around $90,000 to $142,000.

Q. On what do you base that opinion?

A. I base that on bids accepted by the United States Maritime Commission for the scrap liberty ships which they sold at that time.

Mr. Lewis: May I have this document marked for identification?

(The document referred to was marked Petitioner's Exhibit 14 for identification.)

Q. I show you this letter. Are you familiar with it?
A. Yes.
Q. Can you describe it?
A. It's a letter sent to me by Mr. Doty, chief of the ship sales and disposal branch of the United States Maritime Commission.
Q. Will you describe the information on there?
A. I asked Mr. Doty for information concerning the sale of ships at various times, and in this is included a bid which they received, and under which they sold ships identified as PDY-538.
Q. Is this a part of the public records of the Maritime Commission?
A. Yes, it is.
Q. Can you describe the bids, please?

The Court: What is PDY-538?
The Witness: Merely an identification number for their bids which they bring out periodically.

[fol. 72] Q. What is the date of this information? As of what date was it compiled?
A. The high bidders were accepted on—
Q. No, as to what period of time does this relate?
A. December 13, 1957.
Q. Can you describe the accepted bids?
A. There were nine ships sold on that date and they ranged in price from 83,000 to a high of $141,241.41.
Q. Could you read the entire list of accepted bids?
A. The Oscar Shappel, the sales price was $88,636, and was sold to the J. C. Burkwick Company, 551 Fifth Avenue, New York. Shall I read the entire list?
Q. Would you read the list of prices, please?
A. $88,668; $83,663; $88,636; $141,241.41; $90,388.88; $83,000; $86,416.69; $85,889.99.
Q. What would you have bid for a liberty ship for junking at that time?
A. I think my bid would have been lower than this by possibly $30,000.
Q. How do you determine the price that you will bid?

A. We can get a quick evaluation of the value of a ship by using the metallic weight involved, which, in the case of a liberty, is roughly 3,000 tons of steel and, at a maximum, 30 tons of non-ferrous materials. The value is tied in closely with the value of No. 1 steel, which would be that price multiplied by 3,000 gross tons. Then, from that we would subtract our preparation cost, towing, insurance, etc.

The Court: In other words, you make a bid in an amount that will about equal what you can sell the scrap iron for?

The Witness: Yes. However, at the time of bidding you are naturally influenced by the future of the market, because, actually, in buying a ship you are buying futures be- [fol. 73] cause it takes time to prepare that scrap and get it to the market, so it's largely a gamble if you figure closely. There are many things that could influence it besides the No. 1 scrap. Namely, there is a possibility of cutting what we call reroll material from it, which would be valued at perhaps $15 a ton more than the price of No. 1 scrap. Also, early in the program the salvage equipment had value. As the program unfolded and liberty ships were scrapping, were very plentiful, there was less demand for, or less ability to sell, the usable equipment.

Therefore, late in the program you would evaluate the equipment pure as scrap.

By Mr. Lewis:

Q. In December of 1957 were scrap prices rising or falling?

A. I would say they were falling.

Q. You have read to the Court the prices at which these nine liberty ships were sold for scrapping. One at a price of $141,000 and the others all at prices below $91,000. What is your opinion as to the appropriate prices at that time?

A. Well, I would say that the higher price was the result of an uninformed bid. By that I mean I think the people made a mistake. I think they bid too high.

Mr. Lewis: That is all I have. I would like to offer this exhibit in evidence, please.

Mr. Hance: I have no objection to it, your Honor.

The Court: Exhibit 14 is received in evidence.

* * * * * * *

Voyage Charter Fixtures Reported to and Publis
Research, Inc. for Shipment of Heavy Grain in
Vessels of Liberty-type Size for Weeks Ending
October 1955 to December 1958, Inclusive, for
for Which Such Reports Were Made for Ten or Mo

Trade Route	1955 Oct.-Dec.	1956 Jan.-Mar.	1956 Apr.-Ju
U.S. Gulf - Haifa	19.00	-	H 22.2 L 21.5
Northern Range - Yugoslavia	H 15.35 L 15.15	H 16.65 L 15.40	18.7
U.S. Gulf - Piraeus	H 18.00 L 16.50	H 17.15 L 16.75	21.9
No. Pacific - Korea	H 17.00 L 16.35	H 18.00 L 17.25	H 18.5 L 18.0
No Pacific - Japan	-	-	-
Northern Range - Poland	-	-	-
U.S. Gulf - Poland	-	-	-
U.S. Gulf - Karachi	H 24.95 L 23.40	-	28.4
No. Pacific - Formosa	15.85	17.50	18.5

* Rates are in dollars per long ton, terms free discharge. Exclude
and charters for consecutive voyages, part cargoes, or multiple
high, L means low and B means barley.

[fol. 74]

EXHIBIT 6

Fixtures Reported to and Published by Maritime
for Shipment of Heavy Grain in American Flag
rty-type Size for Weeks Ending in the Months
December 1958, Inclusive, for Trade Routes
Reports Were Made for Ten or More Such Weeks.*

6 Dec.	1956 Jan.-Mar.	1956 Apr.-June	1956 July-Sept.	1956 Oct.-Dec.	1957 Jan.-Mar.	1957 Apr.-June	1957 July-Sept.	1957 Oct.-Dec.	1958 Jan.-Mar.	1958 Apr.-June	1958 July-Sept.	1958 Oct.-Dec.
.00	-	H 22.25 L 21.50	H 21.50 L 18.25	19.40	-	19.25	14.00	H 15.00 L 14.25	H 16.00 L 15.10	H 15.50 L 14.50	H 15.00 L 14.25	14.00
.35 .15	H 16.65 L 15.40	18.75	-	-	-	19.07	-	-	H 15.75 L 14.75	H 15.75 L 12.50	H 12.75 L 12.50	-
.00 .50	H 17.15 L 16.75	21.90	H 18.50 L 18.00	H 19.50 L 19.25	H 20.85 L 19.00	18.66	-	-	14.50	15.00	-	-
.00 .35	H 18.00 L 17.25	H 18.50 L 18.00	-	18.50	H 18.50 L 18.43	H 14.75B L 14.00B	H 13.20 L 11.50	H 11.50B L 11.25	H 13.00 L 11.00	-	14.00	-
-	-	-	17.00	-	-	H 13.75 L 13.35	10.85	H 10.75 L 10.35	-	10.50	12.00	8.75
-	-	-	-	-	-	13.85	12.00	H 13.25 L 12.80	-	H 13.00 L 12.30	H 14.75 L 12.10	-
-	-	-	-	-	-	-	H 13.50 L 13.40	H 14.35 L 13.50	-	H 14.35 L 12.75	H 14.75 L 14.00	-
.95 .40	-	28.44	-	H 34.00 L 33.50	-	-	-	21.10	H 24.75 L 23.50	-	-	-
.85	17.50	18.50B	18.50	18.50	H 20.25 L 18.50	-	13.00	13.00	13.00	13.00	-	14.00

, terms free discharge. Excludes rice shipments,
ges, part cargoes, or multiple parcels. H means
ley.

[fol. 75]

EXHIBIT 7

[Letterhead of]

U. S. TREASURY DEPARTMENT

WASHINGTON 25

October 6, 1953

T:S:EP
JHF

Messrs Zock & Petrie
52 Broadway
New York 4, New York

Attention: Mr. Anthony N. Zock
In re: ARROW BARGE COMPANY, INC.
No. 2 Broadway
New York, New York
Reference No. 539

Gentlemen:

This letter is in reply to your letters dated September 15, 1953 and September 30, 1953, with respect to your request for a ruling on behalf of your client, the Arrow Barge Company, Inc., that the useful life of the C1B type steam turbine, dry cargo vessel, the FLYING FOAM, shall be based upon a seven year period from the anticipated purchase date of October 15, 1953, and that the salvage value at the end of that time shall be estimated on the basis of $5.00 per dead weight ton.

After consideration of the information furnished in your letters and office conferences on September 16 and 21, 1953, and the affidavit of Mr. Harry A. Sperling, you are advised that the Internal Revenue Service cannot accept a seven [fol. 76] year life from date of purchase, but will accept a useful life of 20 years from date of construction, terminating October 10, 1964, for the C1B type steam turbine, dry cargo vessel, the FLYING FOAM, the cost at date of acquisition, expected to be October 10, 1953, less salvage value

computed at $5.00 per dead weight ton, shall be spread ratably over the period ending October 10, 1964.

It is understood that the termination date of October 10, 1964, is subject to such change as subsequent experience may warrant.

A copy of this letter is enclosed for the Arrow Barge Company, Inc.

Very truly yours,

R. C. STAEBNER
Chief, Engineering and Valuation Branch
Special Technical Services Division

Enclosure:
Copy of this letter

[fol. 77]

EXHIBIT 8

FRIBOURG NAVIGATION CORPORATION

SCHEDULE OF DAILY OPERATING COSTS—
S/S JOSEPH FEUER

PERIOD JUNE 21, 1957—OCTOBER 8, 1957

Wages (Including OT, Vacation, P&W)	$	868
Subsistence		59
Deck, Engine & Stewards Sundries		63
Maintenance		7
Repairs		218
Insurance (Including Deductibles)		113
Miscellaneous		19
	$	1,347

[OCT/DEC 1937]

VOYAGES ESTIMATES

S/S US FLAG L/B — DW. 10926 — Rate 13/47 — Start GALV

Cargo BALED WHEAT — From GALV — To HAIFA

Speed 10 Knots on 25 f.o. — Cbc. Ft. Bale — Total

" " Grain — Total

" " Grain — Lower Holds

Draft Loaded

Depth Ldg. Port — Depth Disch. Port

Ballast tons, including Deep Tank tons.

Total DW. Summer Freeboard		10926 tons
Less: Allowance for Winter Marks	tons	
" burn-out to 36°N.	tons	
Stores	150	
Shifting Boards/Dunnage	75	
Water	100	
500 Bunkers from GALV to CANTA		
or 4730 miles equal 20 days steaming plus margin and dead oil	650	975
		9945 tons
Add for Tropical Draft		
Leaving available for cargo		9945 tons

@ ft. = ft. Grain = Qrs.

Lower holds & Feeders take tons H.G. To Bag tons / bags.

4730 - 2 = 4728

	Miles	Days	Fuel
Shifting from			
ldg. 4917 tons...		7	35
Voyage.....	4728	29	725
Disch. 3000 tons...		4	20
Shifting to GALV	4728	29	725
Sundry		7	
TOTAL		76	1505

REVENUE

9945 tons @ 15.00 — 149175

Less Comm. 2½ % — 3729

NET REVENUE $ — 145446

Speed/consumption as per charter
Sundry covers 10% all time for S.&.H. and for bad weather; also 10% on coal when not B.W.bunkers.

Exch. @

DISBURSEMENTS

76 days Hire at $ 1347 per day		$	102372
1505 tons Bunkers at $			32735
Starting Port Outward $	Redel. Port Inw. $		
Loading Port Charges	NRT $ 2500		
Stevedoring	tons 3500		6000
Grain Fittings/Dunnage $	Bags $ PORT		2500
Disch. Port Charges	NRT $ 2000		
Stevedoring	tons CAFE		2000
Canal Dues NRT @	Per Canal Net Reg.		
Ballast $	Day Designated LOADING		750
Gratuities & Overtime onboard $	monthly; P. & I. $		
Sundries $	per voyage		2500 — 142857
	(Per Day $) PROFIT/LOSS	$	3411

Printed in U.S.A.

EXHIBIT 9

67 [fol. 78]

Oct/Dec 1957

VOYAGES ESTIMATES

S/S U.S. FLAG LIBERTY | DW. 10920 | Rate $1347 | Start GALV
Cargo BULK WHEAT | From GALV | To POLAND (GDYNIA)
Speed 10 Knots on 25 f.o. | Cbc. Ft. Bale | Total
" " Grain | Total
" " Grain | Lower Holds
Draft Loaded
Depth Ldg. Port | Depth Disch. Port
Ballast tons, including Deep Tank tons.

Total DW. Summer Freeboard			10920 tons
Less: Allowance for Winter Marks	340 tons		
" burn-out to 36°N	240	100 tons	
Stores		150	
Shifting Boards/Dunnage		75	
Water		100	
550 / 151 Bunkers from GALV to KIEL			
or 5395 miles equal 22 days steaming plus margin and dead oil	700		1125
			9795 tons
Add for Tropical Draft			
Leaving available for cargo			9795 tons

@ ft. = ft. Grain = Qrs.
Lower holds & Feeders take tons H.G. To Bag tons / bags.

5395 / 339

	Miles	Days	Fuel
Shifting from			
ldg. 27 tons		7	35
Voyage	5734	24	600
Disch. 13cc tons		8	40
Shifting to GDYNIA	5734	22	400
Sundry		6	
TOTAL		69	1275

Speed/consumption as per charter
Sundry covers 10% all time for S.&.H. and for bad weather; also 10% on coal when not B.W.bunkers.

REVENUE

9795 tons @ 14 35		140 558
Less Comm. 2½ %		3514
NET REVENUE	$	137044

Exch. @

DISBURSEMENTS

69 days Hire at $1347 - per day		$	92943
tons Bunkers at $			28343
Starting Port Outward $	Redel. Port Inw. $		
Loading Port Charges	NRT	$ 2500	
Stevedoring	tons	3500	6000
Grain Fittings/Dunnage $	Bags $	PART	2500
Disch. Port Charges	NRT	$ 2500	
Stevedoring	tons	FREE	2500
Canal Dues NRT @	Per Canal Net Reg.		
Ballast $	1 Day Deviation 486 @ 750		750
Gratuities & Overtime onboard $. monthly; P. & I. $.			
Sundries $. per voyage			2500
			135536

Printed in U.S.A.

(Per Day $) PROFIT/LOSS $ 1508

EXHIBIT 10

68

[fol. 79]

Oct/Dec 1957

VOYAGES ESTIMATES

S/S U.S. FLAG LIBERTY DW. 10920 Rate $1347.- Start GALV
Cargo BULK WHT From GALV To KARACHI

Speed 10 Knots on 25 f.o. Cbc. Ft. Bale Total
" " Grain Total
" " Grain Lower Holds
Draft Loaded
Depth Ldg. Port Depth Disch. Port
Ballast tons, including Deep Tank tons.

Total DW. Summer Freeboard..... 10920 tons
Less: Allowance for Winter Marks.... tons
" burn-out to 36°N..... tons
Stores..... 150
Shifting Boards/Dunnage..... 75
Water..... 100
Bunkers from GALV to CANTA
or miles equal days steaming
plus margin and dead oil..... 650 975
9945 tons
Add for Tropical Draft.....
Leaving available for cargo ..... 9945 tons
● ft. = ft. Grain = Qrs.
Lower holds & Feeders take tons H.G. To Bag tons / bags.

	Miles	Days	Fuel
Shifting from			
ldg. ~ FFT tons...		7	35
Voyage.....	9639	40	1000
Disch. 1000 tons...		10	50
Shifting to ....GALV.....	9539	40	1000
Sundry		10	
TOTAL		107	2085

REVENUE

9945 TONS @ 21.10		209839
Less Comm.	2½ %	5245
NET REVENUE	$	204594

Speed/consumption as per charter
Sundry covers 10% all time for S.&.H. and for bad weather; also 10% on coal when not B.W.bunkers.

Exch. ●

DISBURSEMENTS

107 days Hire at $ 1347.- per day.....		$	144129
2085 tons Bunkers at $			43851
Starting Port Outward $	Redel. Port Inw. $ ..		
Loading Port Charges	NRT .....$ 2500		
Stevedoring	tons @ 35¢ 3500		6000
Grain Fittings/~~Dunnage~~ $	Bags $ ~~PART~~		2500
Disch. Port Charges	NRT .....$ 1000		
Stevedoring	tons ..... FREE		1000
Canal Dues NRT ●	Per Canal Net Reg.....		1500
Ballast $	Despatch - Loading - Day @ 750		3000
Gratuities & Overtime onboard $. monthly; ~~P. & I. $~~ .			750
Sundries $. per voyage.....			2500
			210230
(Per Day $) ~~PROFIT~~/LOSS		$	5636

Printed in U.S.A.

EXHIBIT 11

[fol. 80]

1

Permanent bunkers
Tanks

BUNKER ESTIMATE

s/s US FLAG. LIBRARY voy.

Oil Gravity Visc. Flash F. Pour Forced Draft ?

10 knots on 25
240 miles per day

Port	due	arrived		sailed		fin.	miles	days		Bunkers					
		date	hour	date	hour			sea	prt	plus	uses	arrvl	supply	slg	
GALV	Nov / Dec													650	2.65 · 7 / 2.72 / 17.95
CEUTA							4730	20			500	150	300	450	176/- / 2464
PORT SAID							1942	8			200	250			
ADEN							1396	6			150	100			27.24 · 40 / 24.84
Karachi							1471	6	10		150				
GALV							9539	40			1120				
												450 -	17.95	11668	
												300 · / 1135 · / 2085	2465 / 21.84	7395 / 24788 / 43851	

[fol. 82]

EXHIBIT 12

JACQ. PIEROT JR. & SONS

"AMERICAN EAGLE"	33000	1959
"ATLAS"	35400	1958
"BARBARA JANE"	31500	1959
"EAGLE VOYAGER"	31800	1959
"PENN CHALLENGER"	33173	1960
"OCEAN ULLA"	35500	1960
"ERNA ELIZABETH"	33000	1959
"MOUNT VERNON VICTORY"	46200	1961
"ACHILLES"	41200	1960
"EAGLE TRANSPORTER"	26500	1958
"EAGLE COURIER"	26500	1958
"HANS ISBRANDTSEN"	32700	1958
"TRANSEASTERN"	46400	1959
"NATIONAL DEFENDER"	66500	1959
"ORION HUNTER"	67000	1961
"SISTER KATINGO"	33000	1958
"ATLANTIS"	33000	1958
"SAROULA"	31500	1958
"TITAN"	47400	1960
Total	731273	

COMPARISON OF RATES CHARGED BY AMERICAN FLAG TANKERS WITH RATES CHARGED BY AMERICAN FLAG LIBERTY-TYPE SIZE VESSELS FOR VOYAGE CHARTERS FOR SHIPMENT OF HEAVY GRAIN

Consisting of all instances where voyage charter fixtures for heavy grain were reported to and published by Maritime Research, Inc. for both tankers and liberty-type size vessels for the same week and the same trade route during period October 1955 through December 1958.

Trade Route	Vessel	Tons	Commodity	Terms	Dates	Rate*
Week ending 9/14/57						
USGulf to Poland	ATLANTIC STATES	12000–5%	Hvy Grain	—	Sep. 20/30	12.50*
" "	NATIONAL MARINER	9500–5%	" "	FD	Sep.	13.40
" "	SEASTAR	"	" "	"	Sep. 25/15 Oct.	13.50
Week ending 11/2/57						
USGulf to Trieste	ATLANTIC STATES	13500–5%	Hvy Grain	Gross Terms	Nov. 15/30	13.50*
" "	WESTPORT	9500–5%	" "	FD	Nov. 15/30	15.35
" "	EVIBELLE	"	" "	"	Feb.	19.00
Week ending 2/8/58						
USGulf to Karachi	PAN OCEANIC TRANSPORTER	14000–10%	Wheat	Gross Terms	Early Mar.	17.85*
" "	GREEN VALLEY	9500–5%	"	FD	Mar.	24.25
Week ending 3/15/58						
USGulf to Turkey	BULKCRUDE	20000	Wheat	Gross Terms	Mar.	13.75*
" "	BOSTON	9500–10%	"	FD	Mar. 23/7 Apr.	17.50

*Asterisks represent tankers; unmarked figures represent liberty-type size vessels.

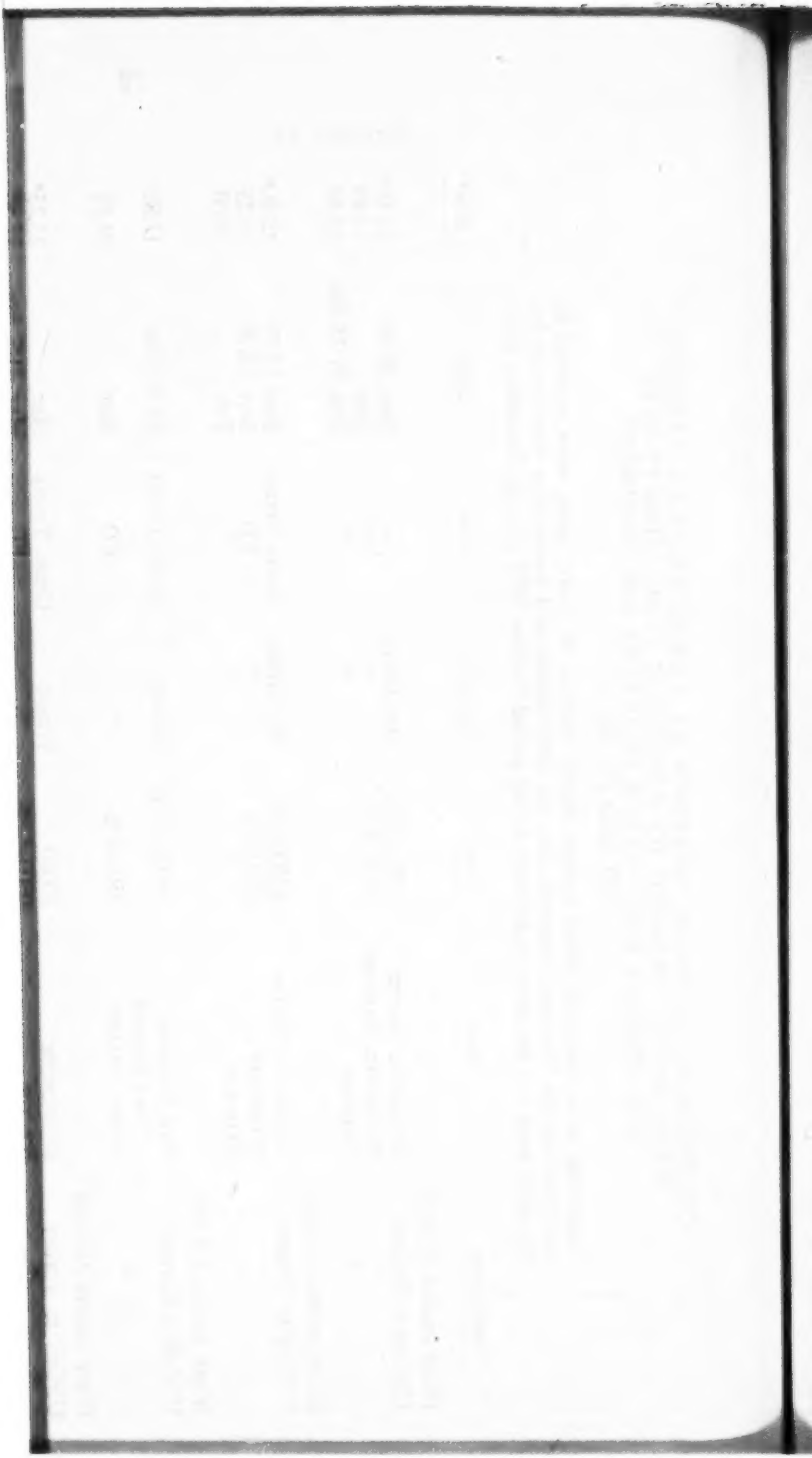

Exhibit 13

Trade Route	Vessel	Tons	Commodity	Terms	Dates	Rate*
Week ending 4/5/58						
NoRg to TurkeyMed	BULKCRUDE	16000–10%	Hvy Grain	Gross Terms	Apr./May	11.95*
" "	STEAMER	9500–5%	" "	FD	Apr. 25/25 May	15.50
						[247]
Week ending 8/9/58						
USGulf to Bombay	TANKER	15000	Wheat	Gross Terms	Aug. 20/5 Sep.	20.00*
" "	JOSEFINA	9500–5%	"	FD	Aug.	23.75
" "	PACIFIC CARRIER	"	"	"	Sep. 5/30	24.00
Week ending 8/16/58						
USGulf to Bombay	TANKER	15000	Wheat	Gross Terms	Sep.	18.00*
" "	TANKER	"	"	" "	Sep.	18.00*
" "	CAPTAIN NICHOLAS	"	"	" "	Sep. 1/30	18.00*
" "	OCEAN JOYCE	9500–5%	Hvy Grain	FD	Aug. 25/7 Sep.	23.75
Week ending 10/11/58						
NoPac to Bombay	WANG GOVERNOR	15000	Wheat	Gross Terms	Oct.	17.00*
" "	PRODUCER	"	"	" "	"	17.00*
" "	BARBARA	"	"	" "	"	17.00*
" "	STEAMER	9500–5%	"	FD	"	24.50
Week ending 12/6/58						
USGulf to Greece	NATIONAL PEACE	15000–10%	Hvy Grain	FD	Dec. 26/10 Jan.	13.25*
" "	PENN MARINER	9500–5%	Corn	FD	Dec./Jan.	14.42
Week ending 12/20/58						
USGulf to Bombay	BARBARA	15000–10%	Wheat	Gross Terms	Jan.	17.00*
" "	PACIFIC WAVE	9500–5%	Corn	FD	Jan. 10/24	23.50

*Asterisks represent tankers; unmarked figures represent liberty-type size vessels.

[fol. 84]

EXHIBIT 14

[Letterhead of]

U. S. DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
WASHINGTON 25, D. C.

IN REPLY REFER TO:
SD:528(P)

June 1, 1962

Luria Brothers & Company, Inc.
Chrysler Bldg.
New York 17, N. Y.
Attention: Mr. R. E. Sorensen

Gentlemen:

Pursuant to your telephone inquiry of May 31, 1962, we enclose copies of abstracts of bids received for Liberty ships offered for scrap during the period January 1, 1954 and December 31, 1957, under Invitations for Bids No. PD-X-517, 525 and 538.

Award of the five ships under PD-X-517 was made to Boston Metals Company for the sum of $353,885 and award of the E. KIRBY SMITH was also made to that Company at their bid price of $147,777.77. Enclosed is a copy of the action taken with respect to the bids under PD-X-538.

Sincerely yours,

M. C. DOTY
M. C. Doty, Chief
Ship Sales and Disposal Branch
Division of Purchase and Sales

Enclosures

[fol. 86]

ACTION TAKEN ON DECEMBER 13, 1957 WITH RESPECT TO BIDS RECEIVED UNDER INVITATION FOR BIDS NO. PD-X-538

Vessel	Sales Price	Successful Bidder
OSCAR CHAPPELL	$ 88,636.00	J. C. Berkwit & Company
GEORGE R. POOLE	88,668.00	551—5th Avenue
FORT LAWRENCE	83,636.00	New York 17, New York
R. J. REYNOLDS	88,636.00	
FORT LIARD	$141,241.41	Sampson Iron & Supply Co. 999 Crockett St. Beaumont, Texas
BENJAMIN FRANKLIN	$ 90,388.88	General Metals of Tacoma, Inc. 1919 Canal Street Tacoma, Washington
HENRY WYNKOOP	$ 83,000.00	Gibbs Corporation Ft. of Hendricks Avenue Jacksonville, Florida
RICHARD J. OGLESBY	$ 86,416.69	The Learner Company 3675 Alameda Avenue Oakland, California
ARTHUR A. PENN	$ 85,889.99	Dulien Steel Products Inc. of Washington 9265 East Marginal Way Seattle, Washington
FORT CHAMBLY	—	All bids rejected
FORT PITT	—	" " "

NOTE: All awards made under Condition 2 requiring complete scrapping of the hulls of the vessels.

[fol. 87]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 72—September Term, 1963.

Argued January 16, 1964

Docket No. 28165

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Before: Swan, Moore and Smith, Circuit Judges.

Petition to review a decision of the Tax Court of the United States, Marion J. Harron, *J.*, upholding disallowance of a depreciation deduction for taxable year in which an asset was sold for more than its depreciated cost. 39 T. C. Memo. 1962-290. Affirmed.

James B. Lewis, New York, N. Y. (Theodore Ness, Michael J. Nassau and Paul, Weiss, Rifkind, Wharton & Garrison, New York, N. Y., on the brief), for petitioner.

[fol. 88] William A. Friedlander, Attorney, Dept. of Justice, Washington, D. C. (Louis F. Oberdorfer, Asst. Atty. General, Lee A. Jackson and Harry Baum, Dept. of Justice, Washington, D. C., on the brief), for respondent.

OPINION—July 15, 1964

SMITH, *Circuit Judge*:

The sole issue presented by this appeal is whether a taxpayer is entitled to a depreciation deduction for the year in which a depreciable asset is sold at more than its depreciated cost. The Tax Court sustained the Commissioner's disallowance of the deduction, and the taxpayer has appealed to this court. We agree with the Tax Court's determination and affirm the judgment.

The taxpayer, Fribourg Navigation Co., operated two cargo ships in foreign commerce. One of these was the *S.S. Feuer*, a Liberty ship purchased in December of 1955 for $469,000. Just prior to purchasing the *Feuer*, the taxpayer secured a letter ruling from the Engineering and Valuation Branch of the Internal Revenue Service advising that it would accept straight line depreciation of the ship over a useful economic life of three years, subject to change if warranted by subsequent experience. The letter ruling also advised that the Internal Revenue Service would accept a salvage value of $54,000 on the *Feuer*. This estimate of the *Feuer's* useful economic life and salvage value, concededly reasonable in December of 1955, was thrown out of kilter by a scarcity of ships resulting from the Suez Crisis of 1956-57, which sharply inflated the values of ships normally considered obsolete. In June of 1957 the taxpayer accepted an offer to sell the *Feuer* for $700,000, $231,000 more than it had paid for the ship a year and a half before. When the *Feuer* was delivered to its new owner on Decem- [fol. 89] ber 23, 1957, the contract terms were slightly modified, reducing the purchase price to $695,500.

Relying on the letter ruling, the taxpayer deducted the $54,000 estimated salvage value from the $469,000 cost and spread the $415,000 equally over a three year useful life—from December 21, 1955 to December 21, 1958. This resulted in a daily depreciation of about $378.65. On its income tax returns, the taxpayer claimed the following depreciation deductions for the *Feuer*:

Calendar Year	Period of Ownership	Depreciation
1955	10 days	$ 3,786.50
1956	366 days	138,585.77
1957	357½ days	135,367.24
	Total	$277,739.51

On March 7, 1957, prior to the sale of the *Feuer,* the taxpayer adopted a plan of complete liquidation, which was carried out within 12 months. Since the liquidation came within the sanctuary of Section 337 of the Internal Revenue Code, the taxpayer incurred no tax liability on the capital gain from the sale of the *Feuer.* For information purposes only, the taxpayer reported a capital gain of $504,239.51 (the difference between the selling price and the adjusted basis after taking a depreciation allowance for 357½ days of 1957). The taxpayer reported a gross income (after cost of operations) of $391,811.31 in 1957. This was reduced to $141,193.35 after deductions of $250,617.96, including $135,367.24 for the depreciation of the *Feuer* in 1957.

The Commissioner disallowed the $135,367.24 deduction in full, taking the position that a taxpayer cannot depreciate an asset during the year its sale reveals that it has not depreciated. At the start of 1957 the *Feuer* had an [fol. 90] adjusted basis of $326,627.73. In December of 1957 it was sold for $695,500. The Commissioner claims Congress never intended to permit further depreciation under such circumstances, and that a depreciation deduction claimed when the taxpayer knows with certainty that the asset has appreciated rather than depreciated must be disallowed as unreasonable. The Commissioner does not seek to recapture the depreciation deductions allowed for 1955 and 1956. He is content with contending only that depreciation disallowance should be limited to the year in which an asset is sold for more than its adjusted basis.

Though perhaps logically inconsistent, this position is strongly suggested by the opinion of the Sixth Circuit in *Cohn* v. *United States,* 259 F. 2d 371 (1958), which first permitted the Commissioner to disallow depreciation deductions on assets sold for more than their adjusted basis. In 1941-42 the taxpayers in *Cohn* began to operate three flying schools to train pilots under the Army Air Corps Contract Flying School Program. The taxpayers determined that their contracts for operation of the schools would terminate at the end of 1944, and the equipment they had purchased to operate the schools should be depreciated

over a useful economic life ending on December 31, 1944. In computing their depreciation deductions, the taxpayers neglected to place any salvage value on the equipment, though operators of similar flying schools used an estimated salvage value of ten percent in establishing their depreciation schedules. One of the schools ceased its operations on August 4, 1944, and its equipment was sold at auction during that month. The property of the other two schools was auctioned off in November of 1944. Because of wartime shortages, the equipment brought substantial sums, exceeding the adjusted basis of the assets at the beginning of 1944. The Commissioner disallowed the depreciation deductions for all the years as excessive and unreasonable. [fol. 91] The District Court found that a salvage value of 10% of the original cost should have been used in computing the depreciation schedules and that the actual sales price should have been substituted for the salvage value in the year in which the asset was sold. Only the latter holding was appealed to the Sixth Circuit, which affirmed the District Court.

The holding of *Cohn* has been variously construed. Some have taken a very narrow view, reading *Cohn* as holding only that on the peculiar facts the District Court's finding that the salvage value should be redetermined in the year of the assets' sale to reflect the sales price was not clearly erroneous. Others have considered it to lay down a rule of law that the depreciation deduction for the year in which an asset is sold must be adjusted to limit the deduction to the amount, if any, by which the adjusted basis at the start of the year exceeds the sales price. Compare *Motorlease Corp.* v. *Comm.*, 215 F. Supp. 356, 361-64 (D. C. Conn. 1963) (rev'd on appeal, July , 1964) and Note, 41 Ore. L. Rev. 159, 165-66 (1962) with *Randolph D. Rouse*, 39 T. C. 70 (1962); Rev. Rul. 62-92, 1962-1 C. B. 29; and Note, 37 Tex. L. Rev. 787 (1959).

Though it could have been more explicit, we think that the *Cohn* case adequately supports the Commissioner's position and supports affirmance of the Tax Court's decision in this case. Section 167(a) of the Internal Revenue Code states as a general rule: "There shall be allowed as a depreciation deduction a reasonable allowance for the ex-

haustion, wear and tear (including a reasonable allowance for obsolescence) . . . of property used in the trade or business . . ." Thus the dispute centers about whether it is reasonable to allow a deduction for depreciation in the year in which an asset is sold for more than its adjusted basis. We think such an allowance unreasonable, for it contravenes the basic purpose of the depreciation deduction. [fol. 92] Basically, our income tax is a tax on net income, and the expenses of generating income are normally considered deductible from gross income. The purpose of the depreciation allowance is to enable the taxpayer to recover the net cost of a wasting asset used in his trade or business by charging the diminution in the asset's value each year against the gross income of that year. Because our income tax system is based on annual reporting and liability and the taxpayer normally holds wasting assets for more than a year, the proper amount of depreciation to be taken each year must depend on estimates. The proper depreciation allowance "is that amount which should be set aside for the taxable year in accordance with a reasonably consistent plan (not necessarily at a uniform rate), so that the aggregate of the amounts set aside, plus the salvage value, will, at the end of the estimated useful life of the property, equal the cost . . . of the property . . ." Treasury Regulations, §1.167(a)-1. See also *United States* v. *Ludey*, 274 U. S. 295, 300-301 (1927).

The Commissioner does not claim that the depreciation schedule adopted by the taxpayer in 1955 when the *Feuer* was purchased was unreasonable. Rather his claim is that it is unreasonable to follow an estimate when one knows that estimate is incorrect. The Commissioner's position finds support in §1.167(b)-0 (a) of the Regulations in force during 1957:

> "Any reasonable and consistently applied method of computing depreciation may be used or continued in use under section 167. Regardless of the method used in computing depreciation, deductions for depreciation shall not exceed such amounts as may be necessary to recover the unrecovered cost or other basis less salvage during the remaining useful life of the property. The

reasonableness of any claim for depreciation shall be [fol. 93] determined upon the basis of conditions known to exist at the end of the period for which the return is made."

We think the Regulations make it plain that the relevant time for assessing the reasonableness of the depreciation deduction is the end of the period for which the return is made. At the end of 1957 it hardly seems reasonable to claim that the value of the *Feuer* had declined below its adjusted basis.

To be sure, the Regulations also provide that the depreciation allowance "shall not reflect amounts representing a mere reduction in market value." §1.167(a)-1. If depreciation schedules had to be revised each time an asset's market value rose or declined, an intolerable strain would be placed on accounting methods. But no such practical difficulty presents itself here. All that is required is a comparison of the asset's selling price with its adjusted basis. A sale which indicates that an estimated decline in an asset's value is greatly out of line is not a "mere fluctuation in market value," but "a single and final adjustment in the closing of the books on the asset involved." *Cohn* v. *United States, supra,* 259 F. 2d at 378.

Though the increment in the *Feuer's* value resulted from a fortuity normally associated with capital gain, the depreciation allowance is measured by the net cost of the asset to the taxpayer. If an asset costs a taxpayer nothing for a year, the economic factors responsible for the lack of expense to the taxpayer should be of no concern in arriving at the depreciation allowance. Here the sale established with mathematical certainty that the entire cost of the ship had been recovered by the sale. No injustice results from denying the taxpayer an allowance he knows to be fictional at the time he claims it.

Little support for the taxpayer's position can be derived from Congressional passage in 1962 of §1245 of the Internal [fol. 94] Revenue Code. Section 1245 is addressed to a much broader problem than disallowance of depreciation deductions for the year of an asset's sale. The *Cohn* case

refused to permit the Commissioner to recapture depreciation in years other than that of an asset's sale. Section 1245 permits recapture of depreciation allowed in years prior to an asset's sale by treating gain on the transfer of certain specified property to the extent of depreciation taken after 1961 as ordinary income instead of capital gains. See generally, Schapiro, *Recapture of Depreciation and Section 1245 of the Internal Revenue Code,* 72 Yale L. J. 1483 (1963).

The judgment of the Tax Court is affirmed.

MOORE, *Circuit Judge* (dissenting):

By its decision in this case and in *United States* v. *The Motorlease Corporation,* decided this day, this court not only enacts judicial legislation which the Congress itself has rejected but overturns judicial and administrative precedents of many years' standing in the field of allowable depreciation.

The law in effect in 1957, the applicable year here, provided as to "DEPRECIATION" that "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—(1) of property used in a trade or business, or (2) of property held for the production of income." (Sec. 167, Int. Rev. Code of 1954.) The basis, "for the purpose of determining the gain on the sale or other disposition of such property," was to be the "adjusted basis provided in section 1011." Sec. 167(f).

The Regulations provide for the setting aside as a depreciation deduction an amount "in accordance with a reasonably consistent plan," "so that the aggregate of the [fol. 95] amounts set aside, plus the salvage value, at the end of the estimated useful life of the depreciable property, equal the cost or other basis of the property as provided in section 167(f) and §1.167(f)-1."

"Useful life," here determined by the Commissioner to have been three years, was subject to modification "by reason of conditions known to exist at the end of the taxable year" and could be "redetermined" but "only when the change in the useful life is significant." §1.167(b).

The other important factor, "salvage value," is defined with clarity as "the amount (determined at the time of acquisition) which is estimated will be realized upon sale or other disposition—" §1.167(c)-1. The Regulation contains the injunctions that "Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels," and that "Salvage value must be taken into account in determining the depreciation deduction . . ." The time period during which depreciation is allowable is from the time "when the asset is placed in service" until it "is retired from service." Proportionate parts of one year's depreciation are allowable for the first and last years during which the asset is in service. §1.167(g)-10.

These underlying and controlling legal principles are clear. Their application to the facts of this case are (or should be) equally clear.

The asset or property is the S.S. Feuer. Its acquisition date was December 21, 1955—the price $469,000.

The Commissioner accepted "Useful life" as three years and salvage value as $54,000. The "reasonably consistent plan" required the setting aside of $378.65 a day for depreciation. If this were done, the "aggregate of the amounts set aside" ($415,000) "plus the salvage value" ($54,000) would equal the cost ($469,000).

[fol. 96] During 1957 the S.S. Feuer earned some $289,340 as gross profit. To achieve this profit the Feuer had to be used and after each day of its use it had suffered wear and tear (depreciation) to the extent of $378.65. The $289,340 was not the net income on which the petitioner under the law was required to pay taxes. Its obligation rested upon net income and net income was obtained only after depreciation ($135,367.24) was deducted. Thus far there can be no variance in thought or legal result—even by the Commissioner, the Tax Court or the majority.

But just as our much vaunted system of law on a national basis can be so easily ignored and repudiated both by judicial and extra-judicial fiats, even more so is this true on an international basis. International law and contract to the contrary, the Suez Canal was closed to shipping in the latter part of 1956. Suddenly the price of ships soared, petitioner chose to forego the balance (approximately one

and a half years—or one-half of the agreed-upon useful life) of the contemplated three-year reasonable plan period and sold the Feuer in June 1957 for $700,000 (actually $695,500 on closing).

The tax computation should have been simple. The cost ($469,000) less depreciation to the date of sale ($277,739.51) enabled petitioner because of its sale for $695,500 to obtain a capital gain of $504,239.51, which petitioner reported.

Particularly important is it to note that although the Suez crisis had radically affected the shipping situation and ship values, the Commissioner did not avail himself of the remedy of modification of useful life and after such redetermination then, but only then, of a redetermination of salvage value. Actually his own regulation prevented him from changing salvage value "merely because of changes in price levels."

Faced with this insurmountable barrier of Congressional enactment, precedent, and regulation, the Commissioner [fol. 97] resolved the problem by the simple and much-used device of amending the statutes without the aid or even participation of Congress. To the depreciation allowance section he merely added in substance the words "except in the event that the asset shall be sold prior to the expiration of its useful life, in which event no depreciation shall be allowed for the year in which such sale is made if the price realized exceeds the depreciated cost at the beginning of such taxable year."

There would have been nothing wrong with such a statute; in fact, the Treasury had been trying to have similar provisions enacted for years. If, however, under our three branches of government system, the legislative branch does not function to the satisfaction of the executive and judicial branches, it is apparently incumbent on the latter two to take over the legislative powers. To be sure the taxpayer had planned his business transaction relying on the law as it was on the books at the time but sooner or later taxpayers must learn not to rely upon Commissioner's rulings, acquiescences, prior audits—or even Commissioners and courts.

What possible rationale is available for the result reached by the majority? They first infer that the Commissioner

is being quite magnanimous in being "content" with only a 1957 disallowance as if taxes and the law were to depend on Commissioners' whims, caprices and contentment. They recognize that in so doing that the Commissioner was "perhaps logically inconsistent" as indeed he was. In enacting his own *ex post facto* legislation, he might just as well have had a sale for more than cost eliminate all depreciation for three years or even from the date of acquisition.

To arrive at its result the majority relies exclusively on what it can only call a strong suggestion in *Cohn* v. *United States*, 259 F. 2d 371 (6th Cir. 1958). It ignores (as it must) the many Supreme Court decisions and the statutes [fol. 98] and regulations leading to a contrary result. When the *Cohn* case is read, no principle is found therein which could support the Commissioner's ruling. The taxpayers in *Cohn* had not fixed any salvage value for their property at the end of its useful life. For this value the District Court chose the sale price. There was no holding in *Cohn* that sale price during the course of useful life (here at the half-way point) should eliminate all depreciation in the year of sale. Nor can *Cohn* possibly be stretched to stand for the proposition that any "reasonably consistent plan" adopted by a taxpayer is to be considered as abrogated by a sale. Any such conclusion would be in specific disregard of the statutes and regulations which provide for the methods of redetermination of useful life and salvage value.

In *Randolph D. Rouse*, 39 T. C. 70 (1962) (the Tax Court here held it "necessary to recognize the *Rouse* case as dispositive of the question presented in this case") relied upon *Cohn*. Depreciation was disallowed only as to the houses which Rouse had sold. Since he had not adopted any "reasonably consistent plan" or estimated any salvage value at the time of acquisition a situation somewhat similar to that in *Cohn* existed. Neither set of facts leads to a result which should be controlling or even persuasive here.

The Tax Court assumed, erroneously and without any supporting basis in my opinion, that "changes in economic conditions have brought about new considerations by the courts of the old, well-established rules relating to de-

preciation allowances in the light of the rising market prices of used assets and the corresponding realization of large gains upon the resale of such used assets." *Massey Motors, Inc.* v. *United States,* 364 U. S. 92 (1960) and *Hertz Corp.* v. *United States,* 364 U. S. 122 (1960) are cited as examples for this proposition. Actually neither case justifies any [fol. 99] such conclusion. Both cases involved taxpayers whose business experience enabled them to determine an estimated salvage value based upon sales long before the end of the physical life of the automobiles used in their businesses. Instead of declaring the principle that sale automatically disqualified a taxpayer from claiming depreciation if the sale price was higher than the depreciated value at the beginning of the year, the *Massey* case, as to one of the taxpayers, used the estimated salvage value of $1,325 per car instead of the actual sales price of $1,380. Had the Supreme Court wished to declare the principle now urged by the Commissioner, it had every opportunity to do so merely by taking the actual sales price. However, it did not.

A thorough and well reasoned analysis of the depreciation problem is set forth in the trial court's decision in *The Motorlease Corporation* v. *United States of America,* 215 F. Supp. 356 (D. Conn. 1963). Although a panel of this court "On the authority of, and for the reasons given in *Fribourg Navigation Co.* v. *Commissioner,* 2d Cir. Docket No. 28165, decided today," reversed *Motorlease,* this case in reality supplies neither reasons nor authority. *Motorlease* reaches its result by saying "neither the Code nor the regulations are dispositive of the issue." To ignore the tax law as clearly written and the interpreting regulations is quite essential to a decision in contravention of such laws. This court in *Motorlease* does not believe that the transmutation of ordinary income into capital gains should be encouraged. Here is another example of the judicial enactment of a law which Congress itself over a long period of years had rejected. As pointed out in *Evans* v. *Commissioner,* 264 F. 2d 502, 513 (9th Cir. 1959), *rev'd on another ground sub nom. Massey Motors, Inc.* v. *United States,* 364 U. S. 92 (1960), "The legislative history

of section 117(j) shows that Congress had not receded from its original purpose. Congress was aware of the Com-
[fol. 100] missioner's contention that taxpayers were converting into capital gains ordinary income arising from unreasonable deductions for depreciation." After reviewing various legislative attempts to have gain treated uniformly as ordinary income the court added tersely, "The recommendation was heard but not adopted." 264 F. 2d at 514.

In *Motorlease* the Commissioner did what he did not do in *Massey*. He took sale price as a new and substituted salvage value despite the specific requirement that it was to be "determined at the time of acquisition." Thus *Motorlease* as decided by this court in substance and actuality goes contrary to the decisions of the Supreme Court in *Massey* and *Evans*.

The factual distinction which makes *Fribourg*, even as the majority decide it, completely inapplicable to *Motorlease*, is that *Fribourg* admittedly does not deal with a business which consisted of short time use of property and its sale before the expiration of its physical life. *Motorlease* was analogous to, and should have been controlled by, *Massey*, *Evans* and *Hertz*. Yet there is no consideration of, or even mention of, those important cases or the legal principles declared therein.

Another series of illuminating beacons the light of which is more than adequate to reveal the right path are recent district court cases from other circuits.

In *Wyoming Builders, Inc.* v. *United States*, decided March 25, 1964, U. S. D. C. D. Wyo., the court was confronted with a refund case involving the disallowance of depreciation on property sold two months before the close of the taxpayer's fiscal year (November 1, 1957—October 31, 1958). The property, an Air Force base housing project, had been set up on a seventy-five year lease basis, all improvements to remain the property of the government upon expiration or termination. When the property was sold to the government in 1958, the taxpayer, as here, [fol. 101] reported as a capital gain the difference between the sale price and the cost less eight years' depreciation.

The court considered the applicable statutes and regulations as well as the *Cohn* case and concluded that the government's theory that no depreciation occurred in the year of sale was untenable, saying in part:

> "Depreciation occurs by use; the use of the property by the taxpayer until September 1, 1958, when the sale took place, resulted in a continued depreciation of the property until September 1, 1958. The expense of using the property was properly allocated by the taxpayer to the period of time which was benefited by that asset, that is, from the beginning of the fiscal year in issue until the date of the sale. Depreciation is the measure of the cost of that part of the assets which has been used up or gradually 'sold' through wear and tear." *United States* v. *Ludey,* 274 U. S. 295, 301 (1927).

The conclusions of the court in *Wyoming Builders* are so consonant with the law that it is impossible to conjure up countervailing arguments. The court held that "Neither the law nor the regulations permit this court to substitute the term 'sale price' for the regulation's term 'reasonable salvage value,'" and that "to sustain the disallowance of taxpayer's depreciation deduction would require an unwarranted judicial extension of the Code and Treasury Regulations." The court believed, as do I, that, if the law is to be changed, "Congress, not the Court, must enact adequate controls and set the standards."

The history of the *Wier Long Leaf Lumber Co.* case, 9 T. C. 990 (1947) and the Commissioner's acquiescence (1948-1962), his non-acquiescence (1962) and its affirmance and partial reversal on other issues, 173 F. 2d 549 (5th [fol. 102] Cir. 1949), is relevant here. The Tax Court held that the sale of depreciated automobiles did not preclude any depreciation allowance in the year of sale and that "mere appreciation in value due to extraneous causes [here the Suez situation] has no influence on the depreciation allowance, one way or the other."

Kimball Gas Products Co. v. *United States,* 63-2 U. S. T. C. ¶9507, W. D. Tex. 1962 was brought for a refund for

overpayment of taxes due to the Commissioner's disallowance of depreciation in the year of sale (1959) of properties acquired in 1955 which for depreciation purposes had useful lives of seven years. The Commissioner disallowed one-half of the depreciation claimed in the year of sale. The court held that the taxpayer was entitled to the full depreciation and a tax refund.

The taxpayer in *S & A Company* v. *United States,* 218 F. Supp. 677 (D. Minn., 1963), a company manufacturing and selling outboard motors, sold its land and depreciable assets on April 1, 1956 to a company which continued the business. It claimed deduction for depreciation from September 1, 1955 to April 1, 1956 in its 1955-1956 fiscal year. The issue framed there was identical with the issue here. The court reviewed in detail the history of the tax laws material to the subject, the Regulations, the *Massey, Hertz, Cohn* and *Wier Long Leaf Lumber* cases and came to the conclusion that the Commissioner improperly disallowed the deduction. In the course of its opinion the court pointed out the distinguishing features of the *Cohn* case (assuming it to be correct), namely, that although "a sale of an asset at the end of its useful life for an amount in excess of its undepreciated cost at the beginning of the year will justify a redetermination of salvage value," it is equally clear that the Tax Court held that sale of assets prior to the end of "useful life" at a price in excess of undepreciated [fol. 103] cost at the beginning of the year of sale does not justify a determination of salvage value because the excess of price over cost is mere appreciation in value.

Refutation cannot be found in saying that these are only district court decisions. They are decisions which apply the tax statutes as they were written and the Supreme Court cases for the principles expounded therein. They do not attempt to ascribe to Congress an intent not enacted into law. Rather the legislative history has disclosed that Congress had been aware of the problem and had intentionally chosen not to act.

The fallibility of the majority opinion is that it completely ignores that law. The majority say "Because our income tax system is based on annual reporting . . . the

proper amount of depreciation to be taken each year must depend on estimates." They should have taken notice of the statutory words requiring that salvage value be "determined at the time of acquisition"—of necessity, an estimate. They then interpret the Commissioner's claim to be that it is "unreasonable to follow an estimate when one knows that estimate is incorrect." To impute such a claim to the Commissioner is to imply that he is unable to read, understand and follow the specific provisions of the law under which he can always seek to rectify an incorrect estimate. Instead of pursuing such a remedy here, the Commissioner concedes the accuracy both of useful life and the salvage value "determined at the time of acquisition."

Finding no support in law for its position and forced to concede that "the increment in the *Feuer's* value resulted from a fortuity normally associated with capital gain," the majority satisfy themselves with the belief that "no injustice results from denying the taxpayer an allowance he knows to be fictional at the time he claims it." Any such legal philosophy has the effect of writing depreciation al- [fol. 104] lowances and depreciation as a matter of sound accounting out of the tax laws. Possibly they intend by their opinion to do so because under such circumstances they say "the economic factors responsible for the lack of expense to the taxpayer should be of no concern in arriving at the depreciation allowance." This approach can scarcely be reconciled with their comment that "If depreciation schedules had to be revised each time an asset's market value rose or declined, an intolerable strain would be placed on accounting methods." It was for this very reason that the Regulation, §1.167(c), provided that "Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels." Of course, sales price can easily be compared with the depreciated cost at the beginning of the year. But there is no law or regulation which declares that in such event no depreciation shall be allowed if the sales price is higher. Therefore, because this decision seems to be completely at variance with the statutes and the applicable decisions, I must dissent.

[fol. 105]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appeals from the Tax Court of the United States.

JUDGMENT—July 15, 1964

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is affirmed.

[fol. 106] [File endorsement omitted]

[fol. 107a] [File endorsement omitted]

[fol. 107]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 28165

[Title omitted]

PETITION FOR REHEARING AND FOR STAY OF MANDATE—
Filed July 28, 1964

To the Honorable Circuit Judges Swan, Moore and Smith of the United States Court of Appeals for the Second Circuit:

Petitioner, Fribourg Navigation Company, Inc., respectfully petitions:

(a) for rehearing of the decision of July 15, 1964 by a panel of this Court consisting of Circuit Judges Swan, Moore and Smith, and suggests that the case be reheard in banc; and

(b) in the event that such petition for rehearing is denied, or is granted and the judgment affirmed, for a stay of the mandate, pursuant to Rule 28(c) of the Rules of this Court, pending the filing of a petition for a writ of certiorari in the Supreme Court of the United States, which petitioner represents to this Court that it intends to file.

The Court's decision was that a taxpayer is not entitled to any depreciation deduction for the year in which it sells [fol. 108] a depreciable asset for more than its depreciated cost at the beginning of the year. Petitioner contends that rehearing should be granted, and suggests that rehearing should be in banc, on the following grounds:

1. This Court's decision violates the basic principle of depreciation, which, like depletion, is a system for allocat-

ing the cost of an exhaustible asset against its production of income over its useful life. The "theory underlying this allowance for depreciation is that by using up the plant a gradual sale is made of it"; the "depreciation charged is the measure of the cost of the part which has been sold." *United States* v. *Ludey,* 274 U. S. 295, 301 (1927).

This Court's distortion of the principle so well stated by Mr. Justice Brandeis is easily illustrated: (a) X purchased in January for $200,000 a mine containing 200,000 tons of ore in place; mined 100,000 tons of the ore by December and sold it for $200,000; and, owing to a shortage in the type of ore, was able to sell the mine in December for $200,000. (b) Y produced a motion picture in January for $200,000; received $200,000 from its exhibition during the year; and, the picture having become popular, sold it for $200,000 in December. (c) Z chartered a ship in January for two years for $200,000; received $200,000 from the operation of the ship during that year; and, a shipping shortage having arisen, assigned the charter in December for $200,000. Mr. Justice Brandeis would have said in the *Ludey* case that one-half of the mine, the motion picture and the ship charter had been sold by being used up; and that one-half of the cost of each should be charged against the income from such use. Not so, says this Court; X paid nothing for the units mined; the year of exhibition of the picture cost Y nothing; Z paid nothing to charter the ship for the first year. All of the cost must be charged against [fol. 109] the one-half of the asset sold in December; none of it against the one-half used up during the year.

2. "All that is required," says this Court, "is a comparison of the asset's selling price with its adjusted basis." "[T]he depreciation allowance is measured by the net cost of the asset to the taxpayer." The "asset costs [the] taxpayer nothing for a year." "[T]he entire cost of the ship had been recovered by the sale."

The trouble with these statements is that they assume the result they are intended to prove. If the whole cost must be charged against the sales price, then, of course, there is no "net cost" left to be deducted from the operating income. But this is not what was done and approved in *Ludey;* the cost was instead allocated partly against operating income and partly against the ultimate sales price. This Court's reasoning is beside the point because it ignores the elementary concept of depreciation.

3. In arriving at this novel result, this Court contradicted 40 years of relevant precedents. Allowance of depreciation in the year of profitable sale of a depreciable asset was approved by the Commissioner of Internal Revenue in published rulings in 1922 (I. T. 1494, I-2 C. B. 19) and 1927 (G. C. M. 1597, VI-1 C. B. 71); by the Board of Tax Appeals in 1927 (*Duncan-Homer Realty Co.,* 6 B. T. A. 730), 1930 (*Herbert Simons,* 19 B. T. A. 711) and 1947 (*Wier Long Leaf Lumber Co.,* 9 T. C. 990); by the Commissioner of Internal Revenue in his 1948 acquiescence in the last decision (1948-1 C. B. 3); by Congressional report in 1950 (H. Rep. No. 3124, 81st Cong., 2d Sess. 29); and by Treasury regulations in 1951 (Reg. 118, § 39.117(g)-2(a)) and 1957 (Reg. § 1.1238-1). One would suppose that in parting company with these and the many other precedents (Pet. Br. 11-35; Pet. Reply [fol. 110] Br. 13-19), this Court would have discussed and repudiated them. But not one is even cited.

4. Having ignored all relevant precedent, this Court asserts that its position is "strongly suggested" by *Cohn* v. *United States,* 259 F. 2d 371 (6th Cir. 1958). We submit that the *Cohn* opinion contains no such suggestion. The Sixth Circuit could not have more explicitly stated that it was not announcing the rule of law which this Court propounds. Drawing from the Government's argument on brief that the District Court's finding of salvage value in *Cohn* "was solely predicated on the facts of this case and, on a different set of facts, it is, of course, possible that an

entirely different finding would result," the Sixth Circuit said that "under the circumstances of this case, we are of the opinion that the District Judge was not in error" and that "his findings of fact with respect to salvage value are . . . not clearly erroneous. . . . " See Merritt, *Government Briefs in Cohn Refute IRS Disallowance of Year-of-Sale Depreciation,* 20 Journal of Taxation 156 (1964). Since the Sixth Circuit adhered to the traditional view that salvage value is the amount realized on sale of an asset "at the end of its useful life" (259 F. 2d at 377), it would not agree with this Court that what petitioner realized on the fortuitous sale of its ship in the middle of useful life was salvage value.

5. What, then, is to be said for this decision? That, although it violates both principle and precedent, it is good tax policy because it protects the revenues? Unfortunately, nothing could be further from the truth:

> (a) For the future the revenues are largely protected by sections 1245 and 1250 of the Internal Revenue Code, which, in effect, recapture upon the sale of a depreciable asset at a profit depreciation allowed for [fol. 111] the year of sale and for prior years.* The revenue gain from the decision is, therefore, mainly a transitory one.

---

* Section 1245 treats as ordinary income gain on the sale of personal property and specified real property sold during a taxable year beginning after December 31, 1962 to the extent of depreciation taken for periods after December 31, 1961. Section 1250 treats as ordinary income gain on the sale of real property (other than real property subject to the recapture provisions of section 1245) sold after December 31, 1963 (a) to the extent of depreciation taken for periods after December 31, 1963 if the property was held for one year or less or (b) to the extent of the excess of such depreciation over straight-line depreciation if the property was held for more than a year but for not more than 20 months. The amount treated as ordinary income under (b) is scaled down by one percentage point for each full month over 20 that the property was held.

(b) However, the decision will result in impairment of the revenues where the sale of the depreciable asset is at a loss. Such impairment will occur whenever gains exceed losses under section 1231 of the Internal Revenue Code. Assume, for example, that an asset which has been depreciated at the rate of $100,000 a year is sold at a loss of $300,000, and that in the same year a parking lot is sold at a $400,000 profit. The loss on the sale of the depreciable asset, which would otherwise offset $300,000 of the capital gain on the parking lot, will be converted into a $300,000 depreciation deduction against ordinary income. This sort of revenue impairment will not be transitory, but will continue beyond the enactment of sections 1245 and 1250.

(c) To the limited extent that the decision will continue, following enactment of section 1250, to disallow depreciation on real property for the year of profitable sale, it can be avoided by deferring the sale until early in the succeeding taxable year or by effecting a change of taxable year. See Rev. Rul. 62-92, 1962-1 C. B. 29.

[fol. 112] (d) Sections 1245 and 1250 provide for recapture of depreciation upon the disposition of depreciable property in various transactions in which gain is otherwise not recognized. For example, those sections recapture depreciation on sales at a gain during corporate liquidation under section 337 (as in the present case), on distributions of appreciated property by a corporation in complete liquidation if basis is determined under section 334(a) or 334(b)(2) (as in *Kimball Gas Products Co.* v. *United States*, 63-2 U. S. T. C. ¶ 9507 (W. D. Tex. 1962), on appeal to 5th Cir.); and on distributions of appreciated property by a continuing corporation as described in section 311(a). As to all such dispositions of property worth more than its adjusted basis this Court's decision has become academic. But if the property so disposed of is worth less

than its adjusted basis the result of the decision will be to transmute nonrecognizable loss into deductible increased depreciation.

Thus, concern for the revenue furnishes no basis for the judicial revision of depreciation principles undertaken by this Court. With the gain situations cured by legislation and the loss situations open for exploitation, the decision can only result in mischief.

6. The important question involved in this proceeding is pending in appeals by the United States to three other Circuits, the Fifth, Eighth and Tenth. The three appeals are from District Court decisions which are in conflict with the decision of this Court. *Kimball Gas Products Co.* v. *United States*, *supra*; *S & A Co.* v. *United States*, 218 F. Supp. 677 (D. Minn. 1963); *Wyoming Builders, Inc.* v. *United States*, 227 F. Supp. 534 (D. Wyo. 1964). *The Kimball Gas Products Co.* case was argued before the Fifth Circuit on November 14, 1963, and the *S & A Co.* case before the Eighth Circuit on May 14, 1964. There is, [fol. 113] therefore, a strong possibility that the Supreme Court will grant the writ of certiorari which petitioner intends to seek. It would be important for the Supreme Court to have the benefit of the thoughtful appraisal of this Court of the significant legal matters which are not explored in its present decision.

We have respectfully submitted the above matters for the Court's analysis because we are deeply concerned over what we regard as serious errors and omissions in its decision on this important question. The strong dissent by Judge Moore in this case and that of Judge Waterman in *United States* v. *Motorlease Corporation*, Docket No. 28470, show that they share this concern.

The result we seek has virtues which this Court's decision lacks. Our view "safeguards the interests of the Government" as a matter of tax policy and, in adhering to

established principle and precedent, "avoids gratuitous re
sentment in the relations between Treasury and taxpayer.
Rosenman v. *United States,* 323 U. S. 658, 663 (1945).

We respectfully request that these matters be considere
on rehearing, and suggest that it is appropriate that the
be considered by the Court in banc.

Respectfully submitted,

James B. Lewis, 575 Madison Avenue, New York
New York 10022, Attorney for Petitioner.

Of Counsel:

Paul, Weiss, Rifkind, Wharton & Garrison.
Michael J. Nassau.

July 28, 1964.

[fol. 114]

Certificate of Counsel

I, James B. Lewis, attorney for petitioner, certify tha
this petition for rehearing is presented in good faith, i
in my opinion well founded and is not filed for the purpos
of delay.

....., James B. Lewis

Dated: New York, N. Y., July 28, 1964.

[fol. 115]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

—v.—

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Before: Swan, Moore and Smith, C.JJ.

RULING ON PETITION FOR REHEARING AND FOR STAY OF MANDATE

Motion for rehearing denied.

TWS by LPM, LPM, JJS by LPM, U.S.C.JJ.

August 7, 1964.

Motion for stay of mandate, subject to conditions of Rule 28(c) of this Circuit, granted.

TWS by LPM, LPM, JJS by LPM, U.S.C. JJ.

August 19, 1964.

[fol. 116] [File endorsement omitted]

[fol. 117]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Leonard P. Moore, Hon. J. Joseph Smith, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING, ETC.

—August 20, 1964

A petition for a rehearing together with a motion for a stay of the issuance of mandate pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for petitioner,

Upon consideration thereof, it is

Ordered that said petition for a rehearing be and hereby is denied.

Further ordered that the motion to stay issuance of the mandate be and it hereby is granted subject to the provisions of Rule 28(c) of the rules of this court.

[fol. 118] [File endorsement omitted]

[fol. 119]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Title omitted]

RULING ON PETITION FOR REHEARING IN BANC —August 19, 1964

James B. Lewis, New York, N. Y., for petitioner.

As no active circuit judge has requested that this case be reheard in banc, and as Judge Swan, who is qualified to vote thereon by virtue of 28 U. S. C. §43 votes to deny, the petition is denied.

J. Edward Lumbard, Chief Judge.

[fol. 120] [File endorsement omitted]

[fol. 121]

IN THE UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Thomas W. Swan, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Hon. Henry J. Friendly, Hon. J. Joseph Smith, Hon. Irving R. Kaufman, Hon. Paul R. Hays, Hon. Thurgood Marshall, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC —August 20, 1964

A petition for a rehearing in banc having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

[fol. 122] [File endorsement omitted]

[fol. 123] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 124]

SUPREME COURT OF THE UNITED STATES

No. 679, October Term, 1964

FRIBOURG NAVIGATION COMPANY, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

ORDER ALLOWING CERTIORARI—February 1, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.